No. 95-1595-CFX Title: Bruce Babbitt, Secretary of the Interior, et al., Petitioners
v.
Marvin K. Youpee, Sr., et al.

Docketed:
April 4, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 22 1996	Application (A95-697) to extend the time to file a petition for a writ of certiorari from March 4, 1996 to April 3, 1996, submitted to Justice O'Connor.
	Feb 23 1996	Application (A95-697) granted by Justice O'Connor extending the time to file until April 3, 1996.
	Apr 3 1996	Petition for writ of certiorari filed. (Response due May 4, 1996)
	May 3 1996	Brief of respondents Marvin K. Youpee, et al. in opposition filed.
	May 15 1996	DISTRIBUTED. May 31, 1996
	May 20 1996	Reply brief of petitioners Bruce Babbitt, Secretary, et al. filed.
	Jun 3 1996	Petition GRANTED. SET FOR ARGUMENT December 2, 1996. **********
	Jun 25 1996	Motion of petitioner the Solicitor General to dispense with printing the joint appendix filed.
	Jul 17 1996	Order extending time to file brief of petitioner on the merits until August 2, 1996.
	Aug 2 1996	Brief of petitioners Bruce Babbitt, Secretary of the Interior, et al. filed.
	Aug 2 1996	LODGING consisting of two copies of GAO publication, Indian Programs, Profile of Land Ownership at 12 Reservations, 2/92, submitted by the Solicitor General.
	Aug 26 1996	Record filed.
	Aug 30 1996	Order extending time to file brief of respondent on the merits until September 16, 1996.
	Aug 30 1996	Record filed.
	Aug 30 1996	Brief amicus curiae of Pacific Legal Foundation filed.
	Sep 5 1996	Motion of petitioner the Solicitor General to dispense with printing the joint appendix GRANTED.
	Sep 16 1996	Brief of respondents Marvin K. Youpee, et al. filed.
	Sep 16 1996	Brief amici curiae of Allottees Association, et al. filed.
	Oct 18 1996	CIRCULATED.
	Oct 23 1996	Reply brief of petitioner Bruce Babbitt, Secretary, et al. filed.
	Nov 1 1996	LODGING consisting of one copy of Department of Interior, Bureau of Indian Affairs, 54 BIAM Supp. 8, "Estates Planning and Administration Guidelines," (July 7, 1992) submitted by the Solicitor General
	Dec 2 1996	ARGUED.

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FILED
APR 3 1996

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
ROBERT L. KLARQUIST
JOAN M. PEPIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

65 pp

QUESTION PRESENTED

Whether Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, which limits descent and devise of certain minor fractional interests in Indian lands, results in a taking of private property without the payment of just compensation in violation of the Fifth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, and Helen Youpee Ricker were plaintiffs/appellees in the courts below.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Interior, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 67 F.3d 194. The opinion of the district court (App., *infra*, 13a-26a) is reported at 857 F. Supp. 760.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. App., *infra*, 1a. A petition for rehearing was denied on December 5, 1995. App., *infra*, 41a-42a. On February 23, 1996, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

2. Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, provides:

> (a) Escheat to tribe; rebuttable presumption
>
> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interests represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of the decedent's death. Where the fractional interest

> has earned its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.
>
> (b) Escheatable fractional interest
>
> Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.
>
> (c) Adoption of Indian tribal code
>
> Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

STATEMENT

1. Pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and other federal statutes dating back to the end of the 19th century, much of the land on Indian reservations was divided into specific tracts that were allotted in trust or restricted status to individual Indians. As the individual interests passed down through successive generations of the original allottees' descendants, they were splintered into mul-

tiple undivided interests, making the property costly to administer and difficult to put to productive use. Congress recognized that problem as early as 1928, and ceased further allotment of Indian lands in 1934. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* Ownership of the existing allotted lands, however, continued to splinter, exacerbating the problems recognized in the 1920s. Finally, in 1983, Congress enacted the Indian Land Consolidation Act (ILCA), Pub. L. No. 97-459, 96 Stat. 2519, 25 U.S.C. 2201 *et seq.*, to correct the serious problems caused by extreme fractionation of ownership of allotted Indian lands. See generally *Hodel* v. *Irving*, 481 U.S. 704, 706-709 (1987).

As initially enacted, Section 207 of the ILCA, 25 U.S.C. 2206 (Supp. II 1984), provided that undivided interests representing 2% or less of the acreage of a tract and earning less than $100 in the year prior to the owner's death could not pass by devise or descent, but would instead escheat to the Tribe upon the owner's death. In *Hodel* v. *Irving*, this Court held that that provision of the ILCA was unconstitutional. 481 U.S. at 718.

2. In 1984, while *Hodel* v. *Irving* was working its way to this Court, Congress amended Section 207 of the ILCA. Act of Oct. 30, 1984, Pub. L. No. 98-608, § 1(4), 98 Stat. 3172. The amendments made three changes of significance for present purposes.

First, unlike the original Section 207, which abolished descent and devise of covered fractional interests even when it would result in consolidation of interests in a parcel of land, the amended Section 207 permits the testamentary devise of fractional interests to persons who already own an interest in the same parcel. 25 U.S.C. 2206(b).

Second, although the original Act provided for escheat of a fractional interest that represented 2% or less of the acreage in the parcel and "has earned to its owner less than $100 in the preceding year before it is due to escheat," the amended version relaxes that provision to apply only where the interest of 2% or less is "incapable of earning $100 in any one of the five years from the date of decedent's death." 25 U.S.C. 2206(a). The amended version further provides that, if the interest "has earned * * * less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent." *Ibid.*

Third, the amended Act provides that, notwithstanding the escheat provision of the ILCA, any Indian Tribe, subject to the Secretary of the Interior's approval, may adopt its own code of laws governing the disposition of escheatable interests. The Secretary may not, however, approve any tribal code "that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. 2203(c).

Although Section 207 had already been amended by the time this Court decided *Hodel*, all of the property at issue in *Hodel* had escheated under the original version of the Act. This Court therefore expressly declined to decide the constitutionality of the amended Section 207. 481 U.S. at 710 n.1. This case squarely presents that issue.

3. Respondents Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, and Helen Youpee Ricker are enrolled members of the Sioux and Assiniboine Tribes of the Fort Peck Reservation. They are

children of William Youpee, who died testate on October 19, 1990, at the age of 75. App., *infra*, 7a, 27a-28a. William Youpee, also an enrolled member of the Fort Peck Tribes, owned undivided fractional interests in allotted trust land on several Indian reservations. William Youpee's will bequeathed his entire interest in each of a number of allotments to a single devisee; the will therefore perpetuated the existing fractionation, but did not exacerbate it. Respondents were among the devisees. See *id.* at 29a-33a.

On April 28, 1992, following a probate hearing at which he explained that certain of William Youpee's interests would escheat to various Tribes under the amended ILCA, the Administrative Law Judge (ALJ) in the Department of the Interior issued an order approving Youpee's will and decreeing the partial distribution of Youpee's estate.[1] App., *infra*, 27a-40a. In his partial decree, the ALJ ruled that, under the amended ILCA, Youpee's interest in five of the twelve allotments bequeathed to respondents escheated to the tribal governments of the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations, where the allotments were located. *Id.* at 7a, 20a, 36a-39a. That decision was based on uncontested certifications by the Bureau of Indian Affairs (BIA) that William Youpee had a 2% or less undivided interest in each of those allotments, that the allotments could not satisfy the "capable of earning $100 annually" requirement of the ILCA, and that the designated

[1] Issuance of a final decree was postponed pending the determination of the status of Robert Martin, a member of the Fort Peck Tribes, who claimed that William Youpee was his father. App., *infra*, 20a.

devisee was not an owner of an existing share of that allotment.[2] C.A. Excerpts of Record (E.R.) 18-38.

Respondents appealed the decree of partial distribution to the Interior Board of Indian Appeals (IBIA), contending that the escheat of Youpee's land was unconstitutional. On August 25, 1992, the IBIA dismissed respondents' appeal because it was without jurisdiction to determine constitutional issues. See App., *infra*, 7a.

4. On February 5, 1993, respondents filed suit in the United States District Court for the District of Montana against the Secretary of the Interior, alleging that the ILCA, as amended, violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution. The district court acknowledged that the amended ILCA "avoids the escheat of certain interests which may have been

[2] The only allotment interest bequeathed to Marvin K. Youpee, Sr., escheated. One of the two interests in allotments bequeathed to Cary G. Youpee escheated. One of the two interests in allotments bequeathed to Allen F. Youpee escheated. Two of the eight interests in allotments bequeathed to Helen Youpee Ricker escheated; four of the remaining six fractional interests were small enough to have escheated, but they did not escheat because Helen Youpee Ricker already owned an interest in those allotments. See 25 U.S.C. 2206(b); App., *infra*, 34a, 37a (referring to interests bequeathed in Clause Fourteenth of decedent's will, including Hugh Eagle Bear, Lame Soldier, Little Head, and Bertha Little Head allotments). Certain interests in other allotments that were bequeathed to other devisees, who did not join in this suit, also escheated. See App., *infra*, 31a (interest of Williamette Bussard), 32a (same), 33a (interest of Darlan D. Youpee); E.R. 22-25, 30, 34. For purposes of these calculations, we count the interests in surface and mineral rights to a single allotment as a single interest.

escheated under the original ILCA," and, "[t]o that extent, the impact of the regulation is mitigated." App., *infra*, 25a. The court also acknowledged that the amended ILCA "corrects the defect [in the original Act] of abolishing devises which would result in consolidation." *Id.* at 23a; see *id.* at 25a. "To that extent," the court continued, "it further promotes the legitimate government interest here of ameliorating fractionation," which the court "agree[d] is a most serious problem." *Ibid.* The court nonetheless found it significant that, because the amended ILCA does not permit the devise of covered fractional interests to lineal descendants who do not already have an undivided interest in the same allotment, it "places many Indian land owners in the [position] of either devising land to a collateral heir or allowing the land to escheat to the tribe." *Id.* at 23a. For that reason, the court held that the amended ILCA violates the Just Compensation Clause, and it enjoined the escheat of the fractional interests at issue. *Id.* at 25a.

5. The court of appeals affirmed. App., *infra*, 1a-12a. Although it agreed that language in *Hodel* v. *Irving* "supports the Government's position that the United States can restrict the descent of fractional interests * * * [and] also suggests that a law requiring a decedent to choose one heir to inherit each fractional interest may be constitutional," *id.* at 11a, the court concluded that the "nature of the Government's regulation of the decedent's land" goes too far by limiting the class of eligible devisees to "a very limited group," which, it believed, "is unlikely to contain any lineal descendants," *id.* at 10a, 11a-12a.[3]

[3] The court did not advert to the fact that one of the respondents in this case—Helen Youpee Ricker—is a child of William Youpee and avoided escheat of interests in several allotments because she already owned interests in them. See note 2, *supra*.

The court was of the view that, because "[t]he amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel," it "continues to completely abolish one of the sticks in the bundle of rights." *Id.* at 12a. The court therefore held that the amended Act violates the Just Compensation Clause. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held the amended Indian Land Consolidation Act (ILCA) unconstitutional. The amendments significantly mitigate the impact of the Act on a decedent's ability to pass property by devise or descent, thereby correcting the constitutional defects that this Court found in the original version of the Act involved in *Hodel* v. *Irving*. The court of appeals' decision, by unduly expanding the scope of this Court's holding in *Hodel* v. *Irving*, creates new limits on the historical ability of the United States and other sovereigns to regulate the disposition of property at death. It also thwarts the government's ability to ameliorate the problems caused by severe fractionation of Indian lands, despite this Court's recognition that "encouraging the consolidation of Indian lands is a public purpose of high order." *Hodel* v. *Irving*, 481 U.S. at 712. Consistent with that purpose, in the almost nine years that have passed since this Court's decision in *Hodel* v. *Irving*, the amended ILCA has been applied in the probate of thousands of estates. The decision below casts a cloud over the settlement of these estates and will, if allowed to stand, substantially frustrate the ongoing

implementation of this important Act of Congress. Further review is therefore warranted.

1. In *Hodel* v. *Irving*, this Court held that the original version of the ILCA was unconstitutional because it effected a taking of private property without just compensation. The Court analyzed the provisions of the original version in accordance with the three-part inquiry derived from *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), which takes into account the economic impact of the regulation, the extent of its interference with reasonable investment-backed expectations, and the character of the governmental action. See 481 U.S. at 713-714.

First, the Court noted that the original Act's economic impact on property owners "can be substantial." 481 U.S. at 714. The Court recognized that the whole of the decedents' property interests had not been taken by Section 207, because they "retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*." *Id.* at 715. But the Court reasoned that the "remainder" interest may constitute a substantial portion of the value of the property. *Ibid.*

Second, the Court concluded that "[t]he extent to which any of [the parties] had 'investment-backed expectations' in passing on the property is dubious." 481 U.S. at 715. The Court noted that "the property ha[d] been held in trust for Indians for 100 years" and that interests in it were "overwhelmingly acquired by gift, descent, or devise." *Ibid.* Furthermore, because of the "highly fractionated ownership," such property is "generally held for lease rather than improved and used by the owners." *Ibid.*

Third, the "character of the governmental action" had two aspects. The fact that there was some "average reciprocity of advantage" when small fractional interests are consolidated in the hands of a Tribe "weigh[ed] weakly in favor of the statute." 481 U.S. at 715. Indeed, the Court noted, "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." *Ibid.* Thus, the Court concluded that, if it "were to stop [its] analysis at that point, [it] might well [have found] § 207 constitutional." *Ibid.* But the fact that the Act amounted to a "complete abolition of both the descent and devise of a particular class of property," *id.* at 717, tipped the scales to require a finding of unconstitutionality, *id.* at 716-718.

2. Because the amended version of the Act substantially ameliorates the defects of the original version before the Court in *Hodel* v. *Irving*, the court of appeals erred in concluding that the amended Act is unconstitutional.

First, the economic impact of the amended Act is less than that of the original version. The version before the Court in *Hodel* v. *Irving* required escheat of any fractional interest of 2% or less that had "earned to its owner less than $100 in the preceding year before it is due to escheat." 481 U.S. at 709. In analyzing the economic impact of that provision, the Court specifically pointed out that there were suggestions in the legislative history of the 1984 amendments to Section 207 that "the failure to 'look back' more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests." *Id.* at 714. Even very valuable property interests may fail to

generate income in a given year, and the original Act's rigid use of a one-year frame of reference could thus exacerbate the economic impact of the escheat.

The amended Act employs a much more flexible standard to ensure that a property interest is genuinely *de minimis* in value before it escheats. The amended Act replaces the rigid $100-in-the-prior-year limitation with a standard permitting escheat only if the property "is incapable of earning $100.00 in any one of the five years from the date of decedent's death." 25 U.S.C. 2206(a).[4] That standard ensures that only interests that are truly minor—and whose maintenance therefore requires a disproportionately large administrative cost—will escheat.

Second, unlike the version before the Court in *Hodel* v. *Irving*, the amended Act no longer prohibits the devise of minor fractional interests. Thus, in *Hodel*, the Court emphasized the fact that the Act "effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—*as for instance when the heir already owns another undivided interest in the property.* Cf. 25 U.S.C. § 2206(b) (1982 ed., Supp. III)." 481 U.S. at 716 (emphasis added). The Court further noted that "[w]hat is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property." 481 U.S. at 718.[5]

The amended Act remedies that defect by permitting devise (but not descent) of property if the devisee already owns an interest in the same parcel; it provides that "[n]othing in this section shall prohibit the devise of * * * an escheatable fractional interest to any other owner of an undivided fractional interest in [the] parcel." 25 U.S.C. 2206(b). Significantly, the Court in *Hodel* v. *Irving* cited that feature of the amended Act in the emphasized passage quoted above. And that provision operated in this case to permit the devise of otherwise escheatable interests to respondent Helen Youpee Ricker. See note 2, *supra*. The 1984 amendments thereby significantly loosened the

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[4] The amended Act provides for a rebuttable presumption that the statutory standard is satisfied "[w]here the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death." 25 U.S.C. 2206(a). As we explained in our brief in *Hodel* v. *Irving*, at 10, this provision read literally would seem to require an interest to earn a minimum of $100 in all five of the years preceding the death of the allottee. However, the congressional intent was only to require that the interest earn $100 in at least one of the preceding five years. See 130 Cong. Rec. 31,715 (1984) (remarks of Rep. Udall). We have been informed by the Department of the Interior that it has implemented the amended version of Section 207 in conformity with that construction of the provision.

[5] The Court repeatedly used the absolute verbs "abolish" and "abrogate," and the adjectives "complete" and "total," in describing the sort of restrictions on descent and devise that were so extraordinary as to require a finding of a taking in *Hodel* v. *Irving*. See 481 U.S. at 716 ("the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property"); *ibid.* ("[e]ven the United States concedes that total abrogation of the right to pass property is unprecedented"); *ibid.* ("this statute effectively abolishes both descent and devise"); *id.* at 717 ("a *total* abrogation of these rights cannot be upheld"); *ibid.* (referring to Court's "holding that complete abolition of both the descent and devise of a particular class of property may be a taking"); *ibid.* ("The difference in this case is the fact that both descent and devise are completely abolished").

restrictions on devise, and they tailored those restrictions closely to the purpose of avoiding the perpetuation or exacerabation of fractionation of allotment interests.

Finally, the amended Act fares better than the version in *Hodel* v. *Irving* in another respect. As Justice Stevens pointed out in that case, the original version "became effective the day it was signed into law"—January 12, 1983. 481 U.S. at 732 (Stevens, J., concurring in the judgment). Since the decedents in *Hodel* v. *Irving* died in March, April, and June, 1983, it was "not reasonable to assume that [the] decedents * * * had anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners." *Id.* at 732-733. By contrast, the decedent in this case had approximately six years between the time the amended Act was passed—October 30, 1984, see Pub. L. No. 98-608, § 1(4), 98 Stat. 3172—and his death on October 19, 1990. Accordingly, he had ample opportunity to "put [his] affairs in order," 481 U.S. at 733 (Stevens, J., concurring in the judgment), by making *inter vivos* transfers of his minor fractional property interests—or of remainder interests in those property interests—or otherwise disposing of them and thereby avoiding escheat.

3. The court of appeals' conclusion is contrary to fundamental principles that have hitherto been accepted in both Indian and non-Indian contexts. In *Hodel* v. *Irving*, this Court began its discussion by recognizing that Congress has "broad authority to regulate the descent and devise of Indian trust lands." 481 U.S. at 712 (citing *Jefferson* v. *Fink*, 247 U.S. 288, 294 (1918)). Moreover, the Court expressly "reaffirm[ed] the continuing vitality of the long line of

cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 718.[6] The "adjustment of the rules" effected by the amended ILCA is within Congress's power under those principles.

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[6] See *Irving Trust Co.* v. *Day*, 314 U.S. 556 (1942) (law permitting a decedent's spouse to take an intestate share of the estate, notwithstanding any contrary provisions of the decedent's will, is constitutional); *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850) (recognizing "the power, which every state and sovereignty possesses, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it"); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898) ("[t]he right to take property by devise or descent is the creature of the law, and not a natural right"); *United States* v. *Perkins*, 163 U.S. 625, 628 (1896) ("Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."); *United States* v. *Fox*, 94 U.S. 315, 320 (1876) ("The power of the State to regulate the tenure of real property within her limits * * * and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted."); *Randall* v. *Krieger*, 90 U.S. (23 Wall.) 137, 148 (1875) ("the expectancy of heirs, apparent or presumptive, before the death of the ancestor" is "upon the same footing" with dower right, which "is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away"); *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192, 202 (1825).

The decision of the court of appeals also has substantial practical importance. In *Hodel* v. *Irving*, the Court stated that "[t]here is little doubt that the extreme fractionation of Indian lands is a serious public problem." 481 U.S. at 718. The nature of the interests at issue in this case bears out that assessment. The interests that would have passed to respondents but that instead escheated under the ILCA ranged from .83% to 1.67% of the parcel involved, see E.R. 18, 19; their average annual income for the preceding five years ranged from zero to 93 cents, see E.R. 18, 29; and the estimated value of the escheated interests ranged from $18.33 to $244.44, see E.R. 19 & 31, 21. The costs of servicing and keeping records of those interests are disproportionate to the income or value of the interests themselves, and the extreme fractionation makes productive use of the land difficult. In the ILCA, Congress intended to address that problem.

The Act has operated as intended for more than 11-1/2 years since it was amended, and for almost nine years since this Court's decision in *Hodel* v. *Irving*. The Department of the Interior estimates that between 9,300 and 14,880 estates involving escheatable interests have been probated under the amended Act in the Ninth Circuit alone. The court of appeals' decision now calls the settlements of those estates into question, erects an obstacle to the implementation of an important Act of Congress in the Ninth Circuit, and creates substantial uncertainty regarding the validity and operation of the Act throughout the nation.[7] In this case, for example, although

[7] The only other court that has ruled on the constitutionality of the amended Section 207 is the District Court for the Western District of Wisconsin. That court recently declined to follow *Youpee*, holding that the Ninth Circuit's decision "gives undue weight to the Court's statements in *Hodel* concerning the importance of the right to pass on property to one's heirs and too little weight to other aspects of the opinion," especially "the Court's emphasis on 'the continuing vitality' of the cases recognizing the sovereign's right to adjust the rules governing descent and devise of property." *Klauser* v. *Babbitt*, No. 95-C-193-C, 1996 WL 96637, at *9 (Mar. 1, 1996). That court declined to "read[] *Hodel* as carving out an entirely new right to pass on property to one's heirs free of governmental regulation." *Ibid.* Noting that the 1984 amendments also corrected the original Act's "lack of fit between the means chosen" and the statutory goal of consolidation, the court in *Klauser* found the amended Act constitutional. *Ibid.*

William Youpee was a member of the Fort Peck Tribes, whose Reservation is in the Ninth Circuit, some of the fractional interests that were subject to escheat in this case were situated on the Standing Rock and Devils Lake Sioux Reservations in South Dakota in the Eighth Circuit.[8]

For the foregoing reasons, review by this Court is warranted to resolve whether Congress's effort to address the problem of extreme fractionation of Indian lands is constitutional.

[8] Because a decedent's property may be located in different circuits, and the decedent's heirs or devisees may reside (and therefore sue) in different circuits, there is a substantial potential for confusion in many cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
ROBERT L. KLARQUIST
JOAN M. PEPIN
Attorneys

APRIL 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35415

MARVIN K. YOUPEE, SR.; CARY G. YOUPEE; DARLAN D. YOUPEE; ALLEN F. YOUPEE; HELEN YOUPEE-RICKER; WILLIAMETTE Y. BUSSARD, PLAINTIFFS-APPELLEES

v.

BRUCE BABBITT, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANT-APPELLANT

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

[Filed: Sept. 5, 1995]

Before: WRIGHT, BEEZER and HAWKINS, Circuit Judges.

OPINION

BEEZER, Circuit Judge:

Congress has tried for many years to solve the problem of fractionation of Indian lands. The Su-

preme Court held Congress' first effort, Section 207 of the Indian Land Consolidation Act, an unconstitutional taking without just compensation. Congress' second effort, amended Section 207, is before us now.

The district court held that amended Section 207 of the Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2206, violates the Takings Clause of the Fifth Amendment. The district court also enjoined the defendants from acting under Section 207 to escheat certain lands to Indian tribes. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I

In the late Nineteenth Century, Congress initiated an Indian land policy under which lands would be allotted to individual members of Indian tribes. General Allotment Act of 1887, ch. 119, 24 Stat. 388.[1] The land was held in trust by the Government for a specified period of time and then descended according to the law of the state in which the land was located. After 1910, allottees were permitted to devise the allotted land by last will and testament in accordance with regulations promulgated by the Secretary of the Interior.

This land allotment policy led to disastrous results for the Indians. As successive generations came to hold the land, large parcels of land became fractionated into multiple undivided interests, with some parcels having dozens of owners. Representative Howard, in discussing the Indian Land Reorganization Act of 1934, explained the problem:

[1] Lands in the Fort Peck Reservation were allotted to individual Indians under The Fort Peck Allotment Act of 1908, ch. 237, 35 Stat. 558, and the General Allotment Act of 1887, ch. 119, 24 Stat. 388.

> On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income.

78 Cong.Rec. 11,728 (1934) *quoted in Hodel v. Irving*, 481 U.S. 704, 708, 107 S.Ct. 2076, 2079, 95 L.Ed.2d 668 (1987).

Recognizing the problem, Congress discontinued further Indian land allotment. Indian Reorganization Act of 1934, 25 U.S.C. § 461. The land allotments continued to splinter, however, as each landowner generally had more than one heir. Congress then enacted ILCA in 1983. The escheat provision, Section 207, provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall decedent [*sic*] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

Hodel, 481 U.S. at 709, 107 S.Ct. at 2079. Congress did not provide for compensation to the landowner of the land subject to escheat. *Id.*

The escheat provision was challenged by the heirs or devisees of members of the Oglala Sioux Tribe. At the time of their deaths, the decedents owned fractional interests in land subject to the escheat provisions. *Id.* The Eighth Circuit held that the statute

violated the Takings Clause because it did not provide compensation to the decedents' estates. *Irving v. Clark*, 758 F.2d 1260 (8th Cir.1985). *Irving* held that the General Allotment Act granted each decedent a vested right of transferring an interest in land at death, thus invoking Fifth Amendment protection. *Id.* at 1268-69.

The Supreme Court affirmed. *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). The Court first noted that the plaintiffs had standing to challenge the escheat provision. The plaintiffs suffered injury-in-fact, satisfying Article III of the Constitution, because they were deprived of fractional interests they otherwise would have inherited. *Id.* at 711, 107 S.Ct. at 2080. The plaintiffs also satisfied the prudential standing doctrine because they could appropriately assert the claims of the decedents. *Id.* The Court then held that Section 207 of ILCA constituted an unconstitutional taking. While recognizing Congress' broad powers to regulate Indian land, the Court held that the escheat provision at issue "went too far" and that it was an extraordinary regulation of privately owned land. *Id.* at 716, 718, 107 S.Ct. at 2083, 2084.

First, the Court noted that while the income generated by the individual parcels may be de minimis, the value of the land itself may not be. *Id.* at 714, 107 S.Ct. at 2082. Second, the statute was unconstitutional because it completely abrogated a decedent's right to transfer land, thereby destroying "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 716, 107 S.Ct. at 2083 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979)). Although the

decedents could enjoy the use of the land during their lifetime and could transfer the land *inter vivos*, "the right to pass on valuable property to one's heirs is itself a valuable right." *Id.* at 715, 107 S.Ct. at 2082. The Court observed that the statute abolished the right to devise even when consolidation of the land could occur.

Finally, the Court recognized the serious problem of extreme fractionation of Indian lands. The Court encouraged Congress to ameliorate this problem and suggested that some regulation of descent and devise of Indian lands may be appropriate. *Id.* at 718, 107 S.Ct. at 2084.

While *Hodel* was pending before the Eighth Circuit, Congress amended the escheat provision of ILCA. However, the Supreme Court declined to address the amended version because none of the land at issue escheated pursuant to the amended statute. The amended version is the subject of this appeal.

The escheat provision was amended in three significant respects. First, the class of land subject to escheat was narrowed. The definition of "fractional interest" changed to a 2 per centum or less interest in a parcel which did not earn $100 in any of the *five* years prior to the date of the decedent's death. 25 U.S.C. § 2206(a). Second, the statute permits landowners to devise their interest to any other owner of an undivided fractional interest. 25 U.S.C. § 2206(b). Finally, the statute permits a tribe to adopt its own laws governing the disposition of escheatable interests, subject to the approval of the Secretary of the Interior. Under amended Section 207, the Secretary may not approve any tribal law which "fails to accomplish the purpose of preventing further descent

or fractionation of such escheatable interests." 25 U.S.C. § 2206(c).[2]

II

William Youpee ("Mr. Youpee") was an enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation. He died testate on October

[2] The text of amended 25 U.S.C. § 2206 provides:

(a) Descent or distribution

No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Escheatable fractional interest

Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Adoption of Indian tribal code

Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

19, 1990. During his lifetime, he possessed several undivided interests in allotted trust land on various Indian reservations.[3] The plaintiffs, Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, Helen Youpee Ricker, Williamette Y. Bussard and Darlan D. Youpee ("the plaintiffs") are enrolled members of the Fort Peck Tribes and are the children and potential heirs of William Youpee.

Mr. Youpee's estate was assigned to a Department of the Interior Administrative Law Judge ("ALJ") to determine the heirs of Mr. Youpee and claims against his estate. At a hearing, the ALJ stated that various certified interests would escheat to various tribes under the amended ILCA, based on Bureau of Indian Affairs certifications that Mr. Youpee's interest in the allotments at issue was 2% or less and the designated devisees were not owners of existing shares of any of the allotments. The plaintiffs did not present any evidence to rebut the presumption of escheat. In April 1992, the ALJ issued an order validating Mr. Youpee's 1981 will and decreed the partial distribution of Mr. Youpee's estate.

The plaintiffs appealed the decree of the partial distribution to the Department of the Interior Board of Indian Appeals arguing that the escheat provisions of ILCA were unconstitutional. The Board of Indian Appeals dismissed this appeal stating that it did not have jurisdiction to determine constitutional issues.

[3] The Government does not contest Mr. Youpee's possession of a vested property right in the undivided interests which is protected by the Fifth Amendment. *See Irving v. Clark*, 758 F.2d 1260, 1262 (8th Cir.1985) ("[V]ested property rights of individual Indians are 'secured and enforced to the same extent and in the same way' as the equivalent rights of other citizens.").

The plaintiffs then filed this action in the district court against Defendant Bruce Babbitt, his agents and assigns ("the Government"). The district court granted summary judgment in favor of the plaintiffs holding that they had standing to assert Mr. Youpee's claim and declaring that amended Section 207 of ILCA violated the Takings Clause of the Fifth Amendment. The Government timely appealed. On appeal, the Government concedes that the plaintiffs have standing to assert the claim of their father but contests the declaratory and injunctive relief ordered by the district court.

III

We review de novo the grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994). A challenge to the constitutionality of a federal statute is also reviewed de novo. *Apache Survival Coalition v. United States*, 21 F.3d 895, 901 (9th Cir.1994).

IV

The Government argues that amended Section 207 cures the unconstitutional flaws of the original version. It contends that the original version was declared unconstitutional because of the statute's extraordinary character of completely abolishing both descent and devise. The amended version does not possess this extraordinary remedy, because it permits the devise of land, restricting only the class of persons who may inherit the land. Unlike the complete abrogation in *Hodel*, the amended statute only partially abrogates Indian landowner rights and, as such, does not violate the Takings Clause.

In contrast, the plaintiffs argue that the amended statute is unconstitutional because the right of

descent is still completely abolished. Further, for a class of Indian landowners, the right to *devise* is also completely abrogated. They state that the bulk of the allotments in question have descended through the generations. Although a decedent may devise escheatable land to heirs that possess a share of the allotment, in very few circumstances will lineal heirs possess an interest in trust land that their parent has inherited by lineal descent. In practice, then, a decedent will have to choose to devise the land to a collateral heir or a stranger, or allow it to escheat to the tribe. In most cases, a landowner will be indifferent between these alternatives and will allow the land to escheat upon death. Thus, the amended version produces the same evil as the original; certain Indian landowners are prohibited from conveying their land by both descent and devise.

In *Hodel*, the Supreme Court applied the three part takings test enunciated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). In considering whether a statute constitutes a taking, the Court has examined the taking question by "engaging in essentially ad hoc, factual inquiries" that have identified several factors. *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659. These factors include (1) the economic impact of the statute; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. *Id.* We next discuss this test as applied in *Hodel* and as it applies to the amended statute.

First, the Court noted in *Hodel* that the economic impact of ILCA could be substantial. While the income *generated* from the parcel may be de minimis, the value of the land itself may not be. *Hodel*,

481 U.S. at 714, 107 S.Ct. at 2082. The Government argues that the amended statute cures this defect because, instead of looking back only one year to determine whether the land has produced $100 in income, the amended statute looks back five years. This argument misses the point. The Court focused on the value of the land itself, i.e., its fair market value if sold. While the income generated from a parcel of land may be a contributing factor in computing its fair market value, it is not the only factor. The parcels of land involved in *Hodel* were valued at $2,700 and $1,816, which the Court found were "not trivial sums." 481 U.S. at 714, 107 S.Ct. at 2082. In this case, Mr. Youpee's fractional interests are valued at $1,239, not significantly less than the land involved in *Hodel*. Thus, despite Congress' attempt to minimize the statute's economic impact, the amended statute has not cured this defect.

In *Hodel*, the Court held that the second factor, the decedents' investment backed expectations, was not implicated by ILCA. The Court determined that the allotments are generally held for lease rather than improved and used by the owners and generate little income for the individual owners. 481 U.S. at 715, 107 S.Ct. at 2082. We agree with the Government that this analysis applies equally to the amended statute and this factor weighs in favor of the statute's constitutionality.

The third and most important factor, however, is the nature of the Government's regulation of the decedent's land. The key distinction between the original and the amended versions of the statute is the permissibility of devise to any other owner of an undivided interest in the parcel of land. The Supreme Court stated, in dicta, that some restriction on the

right to devise fractional land interests may be permissible:

> There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat . . . . It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property.

Hodel, 481 U.S. at 718, 107 S.Ct. at 2084 (internal citations omitted).

This paragraph supports the Government's position that the United States can restrict the descent of fractional interests. This statement also suggests that a law requiring a decedent to choose one heir to inherit each fractional interest may be constitutional.

However, the amended escheat provision goes further than the Supreme Court's dicta. The amended statute approaches the problem from the opposite end of the Court's proposed solution. Instead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a

very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group. The amended ILCA continues to completely abrogate both the descent and devise of land to an heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest. Thus, under ILCA, many decedents will be unable to transfer land to their heirs, which *Hodel* recognizes is "itself a valuable right." 481 U.S. at 715, 107 S.Ct. at 2082.

The amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel. The amended statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners.

While we hold that the amended statute is unconstitutional, Congress may pursue other options to achieve consolidation of the innumerable fractional interests. For instance, the Government may purchase the land, it may condemn the land for a public purpose and pay just compensation, or, as *Hodel* states, it may regulate in some limited fashion the devise and descent of fractional interests to prevent further fractionation. However, as with the statute before the Supreme Court in *Hodel*, we hold that amended Section 207 is an extraordinary and impermissible regulation of Indian lands and effects an unconstitutional taking without just compensation.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV-93-21-BLG-JDS

MARVIN K. YOUPEE, SR., CARY G. YOUPEE, DARLAN D. YOUPEE, ALLEN F. YOUPEE, HELEN YOUPEE-RICKER, AND WILLIAMETTE Y. BUSSARD, PLAINTIFFS

v.

BRUCE BABBITT, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, DEFENDANT

[Filed: Mar. 3, 1994]

MEMORANDUM AND ORDER

SHANSTROM, District Judge.

Plaintiffs, enrolled members of the Fort Peck Tribes, have filed this action seeking declaratory and injunctive relief. Specifically, plaintiffs seek a declaration that section 207 of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2210 (hereafter ILCA), violates the Fifth Amendment in authorizing a taking of real property without just compensation. Plaintiffs also seek injunctive relief preventing defendant

Babbitt and his agents from acting under section 2206 to escheat certain land to Indian tribes. The parties have filed cross-motions for summary judgment.

I

FACTUAL AND LEGAL BACKGROUND

A. Statutory and Case Law History

In 1983, Congress enacted the ILCA to ameliorate the mounting effects of the Indian General Allotment Act of 1887. This allotment legislation provided that each Indian would receive certain acreage. Fort Peck and other reservations were allotted under the provisions of the Act. Chapter 119, 24 Stat. 388, 25 U.S.C. § 348. Under the Act, the allotted land would remain in trust for 25 years, and during that period descend according to the laws of the state where the land was located. 25 U.S.C. § 348.

As successive generations came to hold the allotted lands, the parcels became splintered into multiple undivided interests, with some parcels having numerous owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew worse because each property owner was apt to have more than one heir. So too grew the difficulties of managing property held in this manner and having it maintain its value due to the divisibility problems caused by multiple ownership. *Hodel v. Irving*, 481 U.S. 704, 707, 708, 107 S.Ct. 2076, 2078, 2079, 95 L.Ed.2d 668 (1987).

In response, Congress ended further allotment of Indian lands by enacting the *Indian Reorganization Act of 1934*. Chapter 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq*. However, this did not end the further compounding of fractionation which had already been set in motion. *Id*., at 708, 107 S.Ct., at 2079.

Congress then passed the ILCA in 1983. Section 207, the escheat provision of the ILCA, provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [by intestacy or devise] but shall escheat to that tribe if such interest represents two percentum or less of the total acreage in such tract and has earned to its owner less than $100.00 in the preceding year before it is due to escheat. 96 Stat. 2519.

Id., at 709, 107 S.Ct. at 2079. Congress made no provision for the payment of compensation to the owners of interests covered by section 207.

Section 207 of the ILCA was challenged on Fifth Amendment grounds in the United States District Court for the District of South Dakota. That court upheld its constitutionality. In 1984, while that case was on appeal to the United States Court of Appeals for the Eighth Circuit, Congress amended the ILCA, including section 207, in P.L. No. 98-608, 98 Stat. 3171, 3173. *Irving v. Clark*, 758 F.2d 1260, 1261 n. 1 (8th Cir.1985). 25 U.S.C. § 2206 is the amended version of section 207.

The amended version redefines "fractional interest" to mean one where it has earned less than $100.00 in any one of five (5) years prior to decedent's death. Plaintiffs represent that this change was made to prevent the escheat of land which, although failing to earn $100.00 in the year immediately preceding decedent's death, had, in prior years, been shown to be valuable.

Secondly, the amended version permits a [*sic*] the devise of escheatable interests "to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." 25 U.S.C. § 2206(b). Lastly, the statute provides that the escheat provisions of the ILCA may be superseded by a tribal scheme approved by the Secretary of Interior. It directs the Secretary not to approve any plan, however, that "fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. § 2206(c).

As indicated above, in *Irving v. Clark*, 758 F.2d 1260 (8th Cir.1985), the Eighth Circuit considered the constitutionality of the ILCA's escheat provision. In *Irving*, the heirs and devisees of deceased members of the Oglala Sioux Tribe argued that the escheat provision deprived them of property without just compensation in violation of the Fifth Amendment. *Id.*

The Eighth Circuit concluded that the provision violated the Fifth Amendment in not providing compensation to the decedents' estates. That court grounded its decision on the finding that each Indian allottee gained, through the General Allotment Act, the vested right of passing his or her interests in their land at death, thus invoking Fifth Amendment protection. *Id.*, at 1268, 1269.

The Eighth Circuit noted that the escheat provision had been amended after oral arguments were heard. It found, however, that "its operation as challenged here is unaffected and the parties have not suggested that any of the changes put the plaintiffs outside the provisions coverage." *Id.*, at 1261 n. 1.

The United States Supreme Court affirmed the Eighth Circuit in *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). The Court noted

that the Eighth Circuit had declared that not only the original version of section 207, but also the amended version *not before it*, unconstitutionally took property without compensation. In response, it stated:

> Since none of the property which escheated in this case did so pursuant to the amended version of the statute, this "declaration" is, at best, dicta. We express no opinion on the constitutionality of section 207 as amended.

The *Hodel* court determined that the heirs and devisees had standing to challenge section 207. *Id.*, at 711, 712, 107 S.Ct., at 2080, 2081. It noted that in enacting section 207, which precluded the passing on at death of small, undivided interests in Indian lands, Congress hoped that future generations of Indians would be able to make more productive use of Indian ancestral lands. *Id.*, at 712, 107 S.Ct., at 2081. Due to the highly fractionated ownership, these lands had been generally held for lease rather than improved and used by the owners. *Id.*, at 715, 107 S.Ct., at 2082. Encouraging the consolidation of Indian lands, therefore, was a public purpose of high order and the Court acknowledged that the fractionation problem on reservations may call for dramatic action to encourage consolidation. *Id.*, at 712, 107 S.Ct., at 2081.

Noting that the government had considerable latitude in regulating property rights of owners, the Court nevertheless found that the right to pass on property to one's heirs to be a valuable right. *Id.*, at 716-17, 107 S.Ct., at 2083-84. It also found that although the income from the land parcels could be properly deemed *de minimus*, the value, itself, of the parcels may not be. The BIA placed total approximate

values of $2,700.00 and $1,1816.00 [*sic*] on the escheatable interests. *Id.*, at 714, 107 S.Ct., at 2082.

The Court determined that section 207 completely abolished both descent and devise of these property interests. This occurred even when the passing of the property to an heir may result in consolidation of property—as, for instance, when the heir already owns another undivided interest in the property. *Id.*, at 716, 107 S.Ct., at 2083. Since the escheatable interests were not necessarily *de minimus*, and the availability of *inter vivos* transfer did not obviate the need for descent and devise, the Court determined that a total abrogation of these rights may have been a taking and could not be upheld. *Id.*, at 717, 107 S.Ct., at 2084.

Three concurring opinions were written in *Hodel v. Irving*, *id.*, at 705, 107 S.Ct., at 2077. Justices Brennan and Scalia disagreed in their concurring opinions as to whether this decision limited the scope of a prior taking decision, *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). *Id.*, 481 U.S., at 718-19, 107 S.Ct., at 2084-85. Justice Stevens used a different analysis than the majority opinion. He relied upon the Due Process Clause of the Fifth Amendment in finding that the ILCA failed to give the heirs a fair opportunity to make arrangements to avoid operation of its escheat provision. *Id.*, at 728-30, 107 S.Ct., at 2089-91.

B. The Facts of this Case

The statutory and case law history recounted above serve as a back drop for the presentation of the facts and issues in this case.

William Youpee was an enrolled member of the Sioux and Assiniboine Tribes of the Fort Peck Reservation. William Youpee died on October 19, 1990 at the age of 75. During his lifetime, he possessed, by devise or descent, undivided interests in allotted trust land on several Indian reservations. Plaintiffs are the potential heirs of William Youpee. At the time of Youpee's death, plaintiffs did not have any interest in his undivided trust land. Plaintiffs assert that Youpee was never notified in his lifetime that any of his heirship interests fell under the ILCA, were less than 2% of each allotment, or would escheat to the tribes.

Youpee's estate was assigned to Department of the Interior Administrative Law Judge (ALJ) Vernon Rausch to determine the heirs to and claims against the estate. ALJ Rausch held a hearing at Poplar, Montana on August 5, 1991. At this hearing, a 1981 will and last testament of William Youpee was placed into evidence. At the hearing, the ALJ stated that various certified interests would escheat to various tribes under the amended ILCA.

During the hearing, plaintiffs presented no evidence to rebut the presumption of escheatment under the ILCA. Plaintiffs did not raise the issue of whether decedent's interest in the certified allotments produced any income which would remove those interests from the category of escheatable property.

Plaintiffs assert that the heirs of the decedent heard for the first time at the hearing about the ILCA. They assert they were never told to produce evidence to rebut the presumption of escheatment. They also state that they were not advised at the

hearing that they could submit evidence post-hearing to rebut the presumption.

On April 28, 1992, the ALJ issued an order that approved the decedent's 1981 will, and decreed the partial distribution of William Youpee's estate. A final decree has not been issued because the estate has remained open while the paternity of Robert Martin, a Fort Peck Sioux who claims he is the illegitimate son of William Youpee, is determined.

In his partial decree, ALJ Rausch ruled that decedent Youpee's interest in several allotments on the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations escheated to these respective tribal governments under the ILCA. This decision was based on BIA certifications from each agency that the decedent's interest in specific allotments was 2% or less undivided interest in an allotment, and that the designated devisee was not an owner of an existing share of that allotment.

ALJ Rausch also ruled that the 1981 will was the decedent's last will and testament, as a more recent will had not been signed. Plaintiffs assert that the more recent will, drafted in 1987, was presented to the decedent. After ALJ Rausch denied a rehearing on July 14, 1992, plaintiffs appealed the decree of partial distribution to the Department of Interior Board of Indian Appeals on the issue that escheatment of the decedent's land was unconstitutional. On August 25, 1992, that board dismissed plaintiffs' appeal because it was without jurisdiction to determine constitutional issues. Thereafter, plaintiffs filed this action.

II

DISCUSSION

The parties have framed two issues for decision by this Court. The first is whether plaintiffs have standing in this matter. The second is whether the amended escheat provision of the ILCA violates the Fifth Amendment to the Constitution.

A. Standing

In *Irving v. Clark*, 758 F.2d, at 1267-68, the Eighth Circuit concluded the heirs had standing to challenge the escheat provision. The challenge there was that the statute deprived them of property without just compensation. *Id.*, at 1261. On review, the Supreme Court, in *Hodel v. Irving*, 481 U.S., at 711, 107 S.Ct., at 2081, found that the heirs met constitutional standing requirements along with prudential standing criteria imposed by courts on assertions of third-party standing. In light of the factual and legal similarities between the heirs in that case and the heirs here, the ruling in *Hodel* as to standing appears applicable.

Further, the prudential criteria recognized by the Ninth Circuit in *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1411 (9th Cir.1993), are satisfied here. These criteria are that the plaintiff must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the plaintiff must have a close relation to the third-party; and there must exist some hinderance to the third-party's ability to protect his or her own interests. *Id.*

Here, the injury-in-fact criteria is met because this statute has deprived the plaintiffs of the fractional interest they otherwise would have inherited. The second and third criteria are met by virtue of the fact that the plaintiffs' decedent is deceased and can no longer challenge the operation of this statute on his own behalf.

B. Constitutionality

Defendant stresses that the objection of the *Hodel* court to the original escheat provision was its extraordinary character in abolishing *both* descent and devise, even when the passing of the property to the heir might result in consolidation of property. However, defendant asserts the amended version corrects the defect because, although still prohibiting intestate descent, the right to devise property is now permitted if the devisee owns an existing interest in that property.

Plaintiffs' position is that, notwithstanding this amendment, the right of descent still remains abolished regardless of the heir's status. Further, plaintiffs state that Indians under the age of 18 (28 U.S.C. § 373), incompetent Indians, or those without heirs who have an interest in the land are not allowed the option to execute wills to devise their land. Therefore, as to these groups, the passing by both devise and descent is still precluded.

Specifically, plaintiffs assert that the right to devise is of little consolation to persons such as William Youpee, who did not have lineal heirs who possessed an interest in his allotment. They maintain that in very few circumstances will a child of a decedent possess an interest in trust land that his parent has inherited by lineal descent. Lineal descent

is, therefore, sharply curtailed. As a result, plaintiffs assert that the ILCA places many Indian land owners in the possession of either devising land to a collateral heir or allowing the land to escheat to the tribe.

Plaintiffs argue, then, that the amended ILCA is unconstitutional because it produces the same evil of the original Act, i.e., prohibiting certain Indians (incompetents, those under 18, and those without heirs having an interest in the land) from passing their land by devise and descent.

The *Hodel* court found the original escheat provision to violate the "taking clause" of the Fifth Amendment in its extraordinary abrogation of both descent and devise of these property interests, even when the passing of property to an heir might result in consolidation of property. Thus, even when there was no conflict between the governmental purpose here—property consolidation and the property owner's rights of descent and devise—these rights were, nevertheless, completely abolished under the original escheat provision. *Id.*, 481 U.S., at 718, 107 S.Ct., at 2084.

The amended escheat provision corrects the defect of abolishing devises which would result in consolidation. However, for those property owners who are not legally capable of devising property, or for those like William Youpee, who do not have an heir who possesses an undivided interest in the escheatable property, the statute, as amended, continues to allow the total abolition of both descent and devise of such property.

The *Hodel* court found that the original escheat provision "goes too far." *Id.*, at 718, 107 S.Ct., at 2084. Part of its concern appeared to be that the statute frustrated devise even when it would have accom-

plished land consolidation. *Id.* However, it also found the statute to be extraordinary in character by its *per se* total abolition of descent and devise. It stated:

> If we were to stop our analysis at this point, we might well find sec. 207 constitutional. But the character of the Government regulation here is extraordinary. In *Kaiser Aetna v. United States*, 444 U.S. [164], at 176 [100 S.Ct. 383, at 391, 62 L.Ed.2d 332], we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to ones heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times . . . Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Tr. of Oral Arg. 12-14. Moreover, this statute effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property.

Id., 481 U.S. at 716, 107 S.Ct., at 2083.

In its history of examining whether a regulation of property amounts to a taking requiring just compensation, the Supreme Court has applied various tests. Peterson, *The Takings Clause: In Search of Underlying Principles*, Part I—A Critique of Current

Takings Clause Doctrine, 77 California L.Rev. 130 (1989). In *Hodel*, it utilized the three-factor test espoused in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125-127, 98 S.Ct. 2646, 2659-2661, 57 L.Ed.2d 631 (1978). These three factors are the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Hodel*, 481 U.S., at 714, 107 S.Ct., at 2082.

It was to the *Hodel* court the extraordinary character of the government regulation which made this statute unconstitutional. *Id.*, 481 U.S., at 716, 107 S.Ct., at 2083. I do not deem the amendment to the escheat provision insignificant. First, it avoids the escheat of certain interests which may have been escheated under the original ILCA. To that extent, the impact of the regulation is mitigated. Secondly, it makes consolidation through devise possible, whereas under the original provision it was not. To that extent, it further promotes the legitimate government interest here of ameliorating fractionation—which I agree is a most serious problem.

Nevertheless, in balancing the interests involved, I find that the statute still retains the elements of a compensable government action. Property interests of the decedent and other certain classes of Indians, which are well entrenched in our society, remain totally and completely abrogated.

CONCLUSION

In light of the above, I find that defendant should be enjoined from escheating to the Indian tribes the land of plaintiffs' decedent. I further find that the escheat provision under the ILCA is unconstitutional as violating the "takings clause" of the Fifth Amendment.

Accordingly,

IT IS ORDERED that plaintiffs' motion for summary judgment is granted.

APPENDIX C

IN REPLY REFER TO:
IP TC 176R 91

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
Room 688 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

IN THE MATTER OF THE ESTATE
OF WILLIAM YOUPEE
FORT PECK A02152

ORDER APPROVING WILL
AND
DECREE OF PARTIAL DISTRIBUTION

This case coming on to be heard before the Administrative Law Judge, Office of Hearings and Appeals, Twin Cities, Minnesota, and upon submission of the evidence, the following facts and conclusions of law are presented:

A hearing was duly held at Poplar, Montana on August 5, 1991 for the purpose of ascertaining the heirs at law of the decedent, and the facts and circumstances surrounding the execution of a typewritten instrument dated August 5, 1991, titled "Last Will and Testament of William (NMI) Youpee."

FACTUAL FINDINGS

The evidence on file indicates decedent was born on or about December 19, 1913 and died on October 19,

1990, a resident of the State of Montana at the time of his death.

Decedent's parents were: Frank Youpee, who died in 1954, and Helen Lester, who died in 1984. Both were Fort Peck allottees.

Decedent married several times during his lifetime, his last marriage having been to Eloise Letha Redd, a Fort Peck unallotee, and although it appears there was a pending divorce action in tribal court, they were not legally divorced. Eloise Letha Redd died as a result of the same common accident which caused the instant death of the decedent. No children were born of this marriage.

The following children were born of his marriage to Isabelle Weinberger, a Fort Peck allottee, who died in 1973: Williamette, Helen, Allen, Darlan, Isabelle, Josephine, William Jr. (who died in 1975), Dorothy, Gretchen, Thomas (who died in 1977), Cary, and Marvin. Decedent's son, William Jr., was survived by one child, namely, Leslie Kim Gibbs/Youpee, and decedent's son, Thomas, was survived by one child, namely, Dustin Jade Youpee.

It appears decedent's wife, Isabelle, had a son, Arrow Weinberger, who was born on 8/6/38, prior to his marriage to Isabelle, said child having been adopted by his maternal grandmother, Ida Weinberger. His adoption bars him from inheriting in this estate.

Robert Martin, who was born 10/25/39 to Ruby Vivian Martin Archdale, has also alleged that he is the son of the decedent. The question of his paternity has not yet been resolved in this proceeding.

Decedent did not adopt any children nor were any of decedent's own children adopted by other parents.

HEIRS AT LAW

Had decedent died intestate, his heirs at law, determined in accordance with the laws of descent and distribution in the States of Montana and North Dakota (Mont. Code Ann., Sec. 72-2-203(1) (1983) and (N. D. Cent. Code, Sec. 30.1-04-03(1) (1976)) and pursuant to the Act of 6/17/80, Pub.L. 96-274, 94 Stat. 537 would be his surviving children and the children of his prior deceased children, each entitled to an equal share.

THE WILL

Under the provisions of decedent's last will and testament dated March 5, 1981, Clause First, he bequeaths $10.00 to his wife, Elaine [sic] Letha Redd Youpee. As heretofore stated, she died on the same date as the decedent, and thus this provision of the Will can be ignored, since it is only a token bequest.

In Clause Third, he devises his interest in Allot. 3311, Anges Myrick, Jr., to his daughter, Dorothy Lorene Youpee LaFromboise. Records of the Fort Peck Indian Agency indicate the decedent, in fact, gift-deeded or conveyed his interest in that property during his lifetime to his daughter, Isabelle Florence Youpee.

In Clause Fourth, he attempts to devise his interest in the surface only of two tracts in the Mary Ricker allotment, to his son, Marvin Kurt Youpee, described in the Will as: NW1/4NE1/4, Sec. 1, T.28N., R.51E., MPM and NW1/4NE1/4, Sec. 17, T28N., R. 51E., MPM. The Mary Ricker allotment is Id. No. 794. Only the NW1/4NE1/4, Sec. 17, T28N., R. 51E., MPM was part of that allotment. The other description listed, NW1/4NE1/4, Sec. 1, T.28N., R. 51E., MPM, is part of Allotment 189, Rose Cooley. The decedent never owned an interest in the allotment of

Rose Cooley, No. 189. The share he owned in the allotment of Mary Ricker, NW1/4NE1/4, Sec. 17, T28N., R. 51E, MPM, he conveyed to his daughter, Josephine, and therefore, none of the property devised in Clause Fourth can pass to the devisee, Marvin Kurt Youpee.

In Clause Fifth, he devises his interest in the Helen Youpee Brushorn allotment, described in the Will, to his son, Cary George Youpee.

In Clause Sixth, he devises his interest in the surface only in the Lulu Rena Lester allotment, described in the Will, to his son, Allen Frank Youpee, Sr.

In Clause Seventh, he devises his interest in Allot. 3306, Vivian Weeks, and Allot. 1547, Josephine Mitchell, to his son, Darlan Dwight Youpee.

In Clause Eighth, the decedent gives, devises and bequeaths "to all of my children," my Allotment, 2152, in equal shares, to share and share alike. Because the paternity of Robert Martin has not yet been determined, distribution of this property cannot be decreed in this Order but will be so done in a subsequent modification or adjudication.

In Clause Ninth, the decedent devises his interest in Allot. 2685, Marjorie Weeks Youpee, to his daughter, Gretchen Marie Youpee.

In Clause Tenth, the decedent devises his interest in Allot. 154, Weinberger, to his daughter, Isabelle Florence Youpee Gobert. It appears this devise contains a typographical error, as the allotment of Weinberger is 954. Furthermore, Allotment 154 is that of Susan Cain Moore and the decedent does not own a share or interest therein.

In Clause Eleventh, the decedent devises his interest in Allot. 956, Eagle Hear [sic] (should be

Eagle Bear), to his daughter, Helen Francis Youpee Ricker.

In Clause Twelfth, the decedent devises his interest in any townsite lots in Poplar, Montana, in which he owns an interest, together with improvements thereon, to his daughter, Josephine Marla Youpee. The Fort Peck Indian Agency has indicated decedent had a 13/39 interest to the East 25 ft. of Lots 17, 18 and 19 in Block 22, and that he gift-deeded that property to Josephine Youpee during his lifetime.

In Clause Thirteenth, he devises his interest in the Isabelle F. Weinberger Youpee allotment, described in the Will, to his daughter, Isabelle Florence Youpee Gobert.

In Clause Fourteenth, the decedent devises his interest in three allotments, Hugh Eagle Bear, Lame Soldier, and Little Head, described in the Will, to his daughter, Helen Francis Youpee Ricker.

In Clause Fifteenth, the decedent devises his interest in the following allotments to his daughter, Josephine Marla Youpee: Allotments 1841, Jeff Boyd; 1855, Nellie Boyd; 1857, Archie Boyd; 2247, Pearl Boyd; 429, William Boyd; and 98, John Boyd.

In Clause Sixteenth, the decedent devises his interest in Allotment 169, Chief Ghost Little Santee, and Allotment 170, Chief Ghost Little Santee, to his daughter, Helen Francis Youpee Ricker. Because the decedent's interest in said allotments is less than 2% and Helen Ricker is not a co-owner therein, those interests will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Seventeenth, the decedent devises his interest in Allotment 349B, Mercy Recette, to his daughter, Gretchen Marie Youpee. There appears to

be a typographical error as to the number. It should be 3498, not 349B.

In Clause Eighteenth, the decedent devises his interest in Allotments 517, Lewis Lambert; 518, Lizzie Lambert; and 527, Florence Lambert; to his daughter, Williamette Belle Youpee Bussard. Because the decedent's interest in said allotments is less than 2% and Williamette Bussard is not a co-owner therein, those interests will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Nineteenth, the decedent devises is interest in Allotment 347, Maud Four Spider, to his son, Allen Frank Youpee. Because the decedent's interest in said allotments is less than 2% and Allen Frank Youpee is not a co-owner therein, those interests will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Twentieth, the decedent devises his interest in Allotment 428, Good Woman Hunter, to his daughter, Helen Francis Youpee Ricker.

In Clause Twenty-First, the decedent devises his interest in Allotment 825, Little Santee, to his son, Marvin Kurt Youpee. Because the decedent's interest in said allotment is less than 2% and Marvin Kurt Youpee is not a co-owner therein, that interest will escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Twenty-Second, the decedent devises his interest in Allotment 826, Braid Santee, to his son, Cary George Youpee. Because the decedent's interest in said allotment is less than 2% and Cary George Youpee is not a co-owner therein, that interest will

escheat to the Tribe pursuant to the provisions of the Indian Land Consolidation Act, *supra*, as amended.

In Clause Twenty-Third (23) of said Will the decedent bequeathed to each of his grandchildren one thousand dollars ($1,000). Although the Will goes on to identify by name eleven (11) grandchildren "as this is written", the Will must be construed to mean that the decedent intended for all of his grandchildren that were living as of the date of his death to receive the $1,000 bequest.

The rest and residue of decedent's property he gives, devises and bequeaths to his son, Darlan Dwight Youpee.

Because a final decree of distribution cannot be entered until there has been a supplemental hearing conducted and/or a compromise agreement reached regarding the alleged paternity of Robert Martin by the decedent, and because the attorney for the decedent's family has indicated that the family requests that the monetary bequests be granted or authorized at the earliest possible date, a Decree of Partial Distribution appears in order, and all property can be distributed *with the exception* of the property described in Clause Eighth of the Will.

THE PROPERTY

The decedent's trust or restricted real property is located on the Fort Peck, Standing Rock and Devils Lake Sioux Reservations. The devisees are entitled to take the property devised to them, unless other barred, as stated above, because of the provisions of the Indian Land Consolidation Act, as amended.

THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED

The Bureau of Indian Affairs has certified that the decedent's interests in the real property described on **Exhibits B, D and E** come within the purview of the Indian Land Consolidation Act of January 12, 1983, Pub.L. 97-459, 96 Stat. 2515, which Act was amended on October 30, 1984, Pub.L. 98-608, 98 Stat. 3171. Section 207 of said Act as originally enacted was declared unconstitutional by the Supreme Court of the United States in *Hodel* v. *Irving*, 481, U.S. 704, 95 L Ed 668, 107 S. Ct 2076 (May 18, 1987). However, the Supreme Court expressly did not rule on the constitutionality of the October 30, 1984 amendment.

In accordance with Departmental instructions dated June 16, 1988 from the Chief Administrative Law Judge, Office of Hearings and Appeals, distribution to the Tribe(s) of the decedent's escheatable interests in the property described on **Exhibit B** can now be ordered, as shown herein, since the Bureau of Indian Affairs has indicated the respective specific devisees and the residuary devisee are not co-owners therein, ***except for the*** property devised to decedent's daughter, Helen Frances Youpee Ricker in Clause Fourteenth of decedent's Will. Likewise, the Bureau has indicated that the residuary devisee is not a co-owner in decedent's interests described on **Exhibits D and E.**

CLAIMS

In an interim order entered by the undersigned on 8/5/91, the following claims were allowed, to be paid from funds in the estate account subject to the provisions of 43 CFR 4.251(d) that no payments shall

be made on these unpreferred claims after three (3) years from the date of allowance.

Unpreferred (43 CFR 4.251(a)(4):

$1,183.40 - Visa (charge card)
217.94 - Discover (charge card)
363.15 - Wards
918.89 - Sears
339.33 - J. C. Penney
1,073.79 - Firestone
370.07 - Optima
53.75 - Optima

In another interim order entered by the undersigned on 4/1/92, the following claim was also allowed:

$1,412.20 - Medquest/Dakota Credit

The Fort Peck Indian Agency has advised that all of the above claims have been paid in full.

There was also filed a claim for $68.25 by the Poplar Hospital. Information furnished the undesigned indicates the Indian Health Service has authorized payment of this Bill under authorization No. 09B0403541.

The only other claim filed was by the Diners Club for $598.00. Information now on file indicates this claim has either been paid in full or has been withdrawn for failure to provide adequate proof of the claim. Therefore, this claim is hereby denied.

THE ORDER

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. §372 (1982), as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. §373 (1982) and other applicable statutes, and pursuant to 43 CFR Part 4, the within-

described written instrument dated March 5, 1981 is hereby *approved* as decedent's Last Will and Testament.

IT IS ORDERED, That the Superintendent will cause to be made a distribution of the decedent's trust property, as shown below, *with the exception of Clause Eighth.*

The Superintendent is hereby further directed to retain in the estate account $3,000.00 until such time as a further adjudication or modification is entered, regarding the paternity of Robert Martin. In the event he is found to be the son of the decedent, said funds can be distributed by paying $1,000 to each of his three children, since they would also be grandchildren of the decedent "living" at the time of his death.

To: Cary George Youpee, 206-U06742

Decedent's interest in the allotment of Helen Youpee Brushorn, No. 1096-A, described on Exhibit A.

To: Allen Frank Youpee, Sr., 206-U04980

Decedent's interest in the allotment of Lulu Rena Lester, No. 787-A, described on Exhibit A.

To: Darlan Dwight Youpee, 206-U05104

Decedent's interest in the allotments of Vivian Weeks, No. 3306, and Josephine Mitchell, No. 1547, described on Exhibit A.

To: Gretchen Marie Youpee, 206-U08490

Decedent's interest in the allotments of Marjorie Weeks Youpee, No. 2685, and Mercy Recette, No. 3498, described on Exhibit A.

To: Isabelle Florence Youpee Gobert, 206-U07841

Decedent's interest in the allotments of Weinberger, No. 954, and Isabelle Weinberger, No. 2846 and M-2846 described on Exhibit A.

To: Helen Francis Youpee Ricker, 206-U04979

Decedent's interest in the allotments of Eagle Bear, No. 956, Good Woman Hunter, No. 428, M-428, 428-A and M-428-A, described on Exhibit A, and decedent's interest in the allotments of Hugh Eagle Bear, No. 295, described as Lots 1 and 2, Sec. 6, T. 27N., R.52E. and minerals only M-295A, described as: NE1/4SE1/4 Sec. 2, T.127N., R.52E.; Lame Soldier, No. 528 and M-528 described as the E1/2 Sec. 26, T.29N., R.52E.; Little Head, No. 566 and M-566, described as: E1/2NE1/4NE1/4; Sec. 5, T.27N., R.55E, and Bertha Little Head, No. 568-A and M-568-A, described as SE1/4NW1/4 Sec. 4, T.31N., R.55E., described on **Exhibit B.** (Helen is a co-owner.)

To: Josephine Marla Youpee, 206-U07843

Decedent's interests in the following allotments: 1841, Jeff Boyd; 1855 Nellie Boyd; 1857, Archie Boyd; 2247, Pearl Boyd; 429, William Boyd; and 98, John Boyd, all described on **Exhibit A.**

To: George Franklin Ricker, Jr. (dau. of Helen Ricker),
b. 1/4/69

To: Jonelle Ann Long (dau., of Isabelle Youpee),
b. 1/26/70

To: Leslie Kim Gibbs (dau., of Wm. Youpee, Jr.),
b. 6/6/70

To: Joseph Lester LaFromboise, (son of Dorothy LaFromboise),
b. 7/18/70

To: William Theodore Ricker (son of Helen Ricker),
b. 3/10/71

To: Allen Frank Youpee, Jr. (son of Allen Youpee, Sr.), b. 8/11/71

To: Jennifer Arlene Long, (dau. of Isabelle Youpee),
b. 10/4/71

To: Dustin Jade Youpee (son of Thomas Youpee),
b. 1/18/75

To: Anna Marie Blackbird (dau. of Gretchen Youpee),
b. 11/22/75

To: Royce Anthony LaFromboise, (son of Dorothy LaFromboise),
b. 11/18/79

To: Joseph Cloud Boy (son of Allen Frank Youpee),
b. 1/16/68

To: April Roll (dau. of Isabelle Youpee),
b. 4/2/86

To: Marvin Youpee, Jr. (son of Marvin Youpee),
b. 7/11/83

To: Cherish Miranda Youpee (dau. of Marvin Youpee),
b. 1/6/86

To: William Youpee III (son of Marvin Youpee),
b. 11/7/87

To: Iris Ariel Youpee (dau., of Marvin Youpee),
b. 8/3/90

Each the sum of One thousand dollars ($1,000.00)

To: The United States of America in Trust for the Assiniboine and Sioux Tribes, Fort Peck Reservation

All of decedent's interests in property described in Exhibit B, *except* decedent's interests in Allotments 295 and M-295-A, Hugh Eagle Bear; 528 and M-528, Lame Soldier; 566 and M-566, Little Head; and 568-A, M-568-A, Bertha Little Head (devised to Helen Francis Youpee Ricker in Clause Fourteenth).

To: The United States of America in Trust for the Standing Rock Sioux Tribe, Standing Rock Reservation, North and South Dakota

All of decedent's interests in property described on Exhibit D.

To: The United States of America in Trust for theDevils Lake Sioux Tribe, Devils Lake Reservation, North Dakota

All of decedent's interests in property described on Exhibit E.

To: Darlan Dwight Youpee, 206-U05104

All of the rest and residue of decedent's trust or restricted property, including the interests in property described on Exhibit A, which are not otherwise specifically devised, (viz. M-958) *except* any other real property interests which are subject to the escheat provisions of the Indian Land Consolidation Act, as amended, if any there be.

The trust or restricted real property interests of the decedent are appraised for probate purposes at $119,461.85. The estate account also contained funds in the approximate amount of $19,068.50 (as of 4/16/92).

Done at the Twin Cities, Minnesota and date *April 28 1992.*

/S/ VERNON J. RAUSCH
VERNON J. RAUSCH
ADMINISTRATIVE LAW JUDGE

[Appendices omitted]

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-35415
D.C. No. CV-93-00021-JDS

MARVIN K. YOUPEE, SR.; CARY G. YOUPEE; DARLAN D. YOUPEE; ALLEN F. YOUPEE; HELENYOUPEE-RICKER; WILLIAMETTE Y. BUSSARD,
PLAINTIFFS-APPELLEES

v.

BRUCE BABBITT,
SECRETARY, DEPARTMENT OF INTERIOR,
AND HIS AGENTS, ASSIGNS,
AND SUCCESSORS IN OFFICE,
DEFENDANT-APPELLANT

[Filed: Dec. 5, 1995]

Before: WRIGHT, BEEZER AND HAWKINS, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judges Beezer and Hawkins vote to reject the suggestion for rehearing en banc and Judge Wright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service

has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Supreme Court, U.S.
FILED
MAY 3 1996
CLERK

(2)

No. 95-1595

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

BRUCE BABBITT, Secretary of the Interior, et al.,
Petitioners

v.

MARVIN K. YOUPEE, SR., et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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BRIEF IN OPPOSITION

Rene A. Martell
Counsel of Record
Montana Legal Services
P.O. Box 409
Poplar, MT 59255
(406) 768-3006

Daniel L. Minnis
Montana Legal Services
P.O. Box 627
Browning, MT 59417
(406) 338-7623

Attorneys for Respondents

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C 2206, violates the Fifth Amendment because it does not provide for compensation to the estate of the decedent for the land it declares to escheat.

PARTIES TO THE PROCEEDINGS BELOW

In the courts below the defendant/appellant was the Secretary of the Interior. The plaintiffs/appellees were Marvin K. Youpee, Sr., Cary G. Youpee, Darlan D. Youpee, Allen F. Youpee, Helen Youpee-Ricker, and Williamette Y. Bussard.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2201-2210.

STATEMENT OF THE CASE

The first two paragraphs of the Petitioner's Statement present an adequate history of the Indian Land Consolidation Act (ILCA) up through this Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987).

The decedent, William Youpee, died testate on October 19, 1990. He was an enrolled member of the Fort Peck Tribes and owned undivided fractional interests in allotted trust land on Fort Peck, Standing Rock and Devils Lake Sioux Reservations. Thirty-four (34) of the land and mineral parcels that he devised to his children escheated under amended Section 207. The devisee of these parcels were Marvin K. Youpee, Sr.; Cary G. Youpee; Darlan D. Youpee; Allen F. Youpee; Helen Youpee-Ricker and Williamette Y. Bussard.

All the devisee filed suit on February 3, 1993, in the United States District Court for the District of Montana against the Secretary of the Interior alleging that

the ILCA, as amended, violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution. C.A. Excerpts or Record (E.R.) 3-4. These plaintiffs also argued that the Department of the Interior as trustee for the decedent had failed to advise him that his land as devised would escheat to tribes. E.R. 5. The court held that the ILCA as amended violates the Just Compensation Clause for those property owners who are not legally capable of devising property or who do not have an heir who possesses an undivided interest in the escheatable property. App. Pet. 23a.

The court of appeals affirmed, holding that amended ILCA restricts devise and descent of land by Indian landowners who do not have an heir who owns a share in the parcel and that the statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners. In addition, the court held that amended Section 207 is an extraordinary and impermissible regulation of Indian lands and effects an unconstitutional taking without just compensation.

REASONS FOR DENYING THE WRIT

I. THERE IS NO DISAGREEMENT AMONG THE UNITED STATES COURTS OF APPEALS ON THE QUESTION AT ISSUE IN THIS CASE.

The rules of this Court defining the limits of this Court's jurisdiction over decisions of the United States courts of appeals does not lend support to petitioner's request that this Court invoke its discretionary jurisdiction to review the opinion below. Rule 10 of the Rules of the Supreme Court of the United States recites as a reason for granting a writ of certiorari,

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;

Two United States Courts of Appeals have considered whether amended Section 207 is constitutional. Both the Ninth Circuit Court of Appeals here and the Eighth Circuit Court of Appeals have concluded that amended Section 207 is unconstitutional.

The United States Court of Appeals for the Eighth Circuit in *Irving v. Clark*, 758 F.2d 1260 (1985) overruled the lower court and held that the escheat provisions of the Amended Indian Land Consolidation Act constitute a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. Although that conclusion was

declared dicta by this Court in a footnote in *Hodel v. Irving*, 481 U.S. at 710, n.1, the holding of the Court of Appeals remains good law. It cannot be said that a case is not authority on a point because, although that point was properly presented and decided, something else in the end was found which disposed of the whole matter. *Florida C.R. Co. v. Schutte*, 103 U.S. 118 (1881).

Petitioner cites to *Klauser v. Babbitt*, 95-C-193-C, 1996 WL 96637 (W.D. Wis. March 1, 1996), as a recent lower court decision that has held that amended Section 207 is constitutional. Petitioner speculates that because of this ruling, there is a substantial national uncertainty regarding the validity and operation of the Act. *Klauser* has been appealed to the Seventh Circuit court of appeals and any court of appeals that has heard this issue has ruled that the amendments are unconstitutional. Two things can happen on appeal in *Klauser*. The Seventh Circuit could follow the Ninth Circuit. If so, there would be no split in the circuits and the needed uniformity in the law will have been achieved without the need for action by this Court. The other scenario would be that the Seventh Circuit would uphold the constitutionality of ILCA. If that were to happen, then it would be appropriate at that time to grant certiorari in that case. This Court would then have advantage of the divergent views of two different circuits.

At the current time, there is no substantial uncertainty within any circuit (Eighth and Ninth Circuits) that has dealt with this issue. This Court should wait and have the advantage of the judicial analysis of other circuit courts should those circuit courts ever be in conflict on the constitutionality of the amendments.

II. THE CIRCUIT COURT OPINION IS CORRECT.

The Ninth Circuit correctly lays out the effects of the amended act. The effects are threefold: first, the right to descent is completely abolished for all, second, the right to descent and devise is abolished for an entire class of Indian landowners; and third, the right to descent and devise is de facto abolished for all because the practical outcome of forcing decedents to choose between leaving to collateral heirs or strangers "...produces the same evil as the original; certain Indian landowners are prohibited from conveying the land by both descent and devise." *Youpee v. Babbitt*, 67 F.3d 194, 198 (9th Cir. 1995)

After considering these effects, the Court correctly applies the three part *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) analysis to determine that the effects of the amended act result in an unconstitutional taking. The interest taken is one's right to devise 2% land which under the amended act escheats to the tribe.

The Court appropriately conditions the disposition of the case upon the *Penn Central* analysis because it correctly assumes that the Indian decedent's right to devise his allotted land and the right to have it descent is a vested one. Once such an assumption is made, the Court must conclude that a taking results when these rights are foreclosed by a Congressional act; that is, the amended act.

In this case the decedent's right to devise is grounded in the various treaties and agreements which set the boundaries of the Fork Peck Reservation. It is also

found in the General Allotment Act which provided that land would be held in trust for the allottee **or his heirs.**[1].

To obtain these allotments, allottee had to relinquish any rights they had to their common interest in Tribal land. The lands allotted and the right of the heirs to that land as consideration for the relinquishment of lands held in common. *Choate v. Trapp*, 224 U.S. 665 (1911).

Congress expressly granted allottees the right to devise. Specifically, Congress provided that allottees

> ...shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, ... 25 U.S.C. 373.

While some may argue that Congress by the amended act can abrogate this right, such arguments

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[1]The allotment acts promise the right of descent and devise. Section 25 U.S.C. 348 provides that the

> "... Secretary of the Interior shall cause patents to issue therefor in the name of the allottee, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty five years, in trust for the sole use and benefits of the Indian to whom such allotment shall have been made, or, in the case of his decease, of **his heirs** according to the laws of the State or Territory where such land is located..." [emphasis added]

would be misplaced. They are misplaced because it has only been held that Congress may reallocate tribal lands, *Gritts v. Fisher*, 224 U.S. 640 (1912), *United States v. Jim*, 409 U.S. 80, reh.denied, 409 U.S. 649 (1976), *Northern Cheyenne v. Hollowbreast*, 4425 U.S. 665 (1976), but it may not reallocate individual land, *See e.g. Choate v. Trapp, supra*, without triggering the fifth amendment. Id.

The Ninth Circuit's result using the *Penn Central* analysis is correct. First, the Court decided that the amended act's provisions did not ensure that income generated by a parcel was but one component of the parcel's value.[2] It correctly concluded, as this Court did in *Hodel*, that a parcel's fair market value, if sold, is the appropriated measure.[3] *Youpee*, 67 F.3d at 199 citing *Hodel v. Irving*, 481 U.S. at 715.

Next, the Court correctly decide that changes to the original version of the act which permit devise to any other owner of an undivided interest in the parcel does not cure the taking problems. This is a correct conclusion because the amended version allows devise only to those who have an heir who owns a share in the parcel. Descent by intestacy rules remains improper, and an entire class of Indian decedents who are under twenty-one are foreclosed from devising their 2% interests or

---

[2]The amended act looks back five years. If the land generates income in excess of $100.00 in any of those years, it may not escheat. 25 U.S.C. §2206(a).

[3]The record indicates that in this case the value of the escheated land amounts to $2,100.00 ER at 4.

allowing them to descend.

Appellants see it differently, They point to O'Connor's dicta in *Hodel* and attribute support for the amended statute's constitutionality to her remarks and suggestions. 481 U.S. at 718. The Ninth Circuit correctly disposes of this argument after it rightfully concluded that the amended statute does not follow Justice O'Connor's suggestions.

O'Connor's suggestions imply that a revamped stature which abolishes descent by rules of intestacy may be constitutional. 481 U.S. 704 at 718. Such a prohibition, she speculates, would force owners to formally designate an heir. Id. Thus, a Constitutional taking is avoided because the testator's right to devise remains intact. The 9th Circuit correctly observes that the amended statute does not, as Justice O'Connor's dicta suggests, allow the "....decedent to choose a devisee from the population,...[it]...restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group." *Youpee*, 67 F.3d at 199. Thus ones right to devise is effectively eliminated.

III. THIS CASE IS PROCEDURALLY FLAWED.

First, Rule 14 of the Rules of the Supreme Court of the United States requires that a petition for a writ of certiorari shall contain:

> (b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed...

The petitioner has failed to list as parties two of the plaintiffs/appellees in the courts below. Darlan D. Youpee and Williamette Bussard were plaintiffs in the district court proceeding. E.R. 3, 45. Darlan D. Youpee and Williamette Youpee were appellees in the case below. App. Pet. 1a. The petitioner now does not name Darlan D. Youpee and Williamette Youpee as parties over whom the petitioner seeks review in this Court. At page II of the petition and at paragraph 3, page 5 of the petition, the petitioner does not name D.Dwight Youpee and Williamette as parties. In addition, at note 2 on page 7, the petitioner states that Darlan D. Youpee and Williamette Youpee had escheatable interests but did not join in this suit.

All the persons with escheatable interests from the decedent have always been a party to this suit. In fact, Darlan D. Youpee was willed 20 land and mineral parcels and Williamette Youpee was willed 5 land and mineral parcels. E.R. 22-25, 30, 34, 40-44. By not including Darlan D. Youpee and Williamette Youpee as parties, the petitioner seeks to portray the land and mineral interests involved as de minimis.

However, the greatest impact here is, that because Darlan D. Youpee and Williamette are not named as respondents, this Court is not vested with jurisdiction over them. As such, Darlan D. Youpee and Williamette Youpee are vested with a final judgment from the Ninth Circuit that is not reviewable. *International Union v. Scofield*, 382 U.S. 205 (1965).

A court of review does not have jurisdiction over a party who was not specified in the notice of appeal. *Torres v. Oakland Scavenger Company, et al.*, 487 US

312, reh den U.S. (1988). In *Torres*, a secretary had inadvertently omitted Torres' name from the list of 16 appellants on the notice of appeal. In finding that the review court was without jurisdiction, this Court dismissed arguments that the omission was an informality of form or title as well as the argument that good cause shown should suspend the requirements of the rules or that "et al." in the notice was sufficient to notify the respondent and the court that petitioner was an appellant. Failure to join all appellees should result in dismissal of the petition. *Hartford Acci. & Indem. Co. v. Bunn*, 285 U.S. 169 (1932); *Davenport v. Fletcher*, 57 U.S.(16 How.) 142 (1854).

Second, the petitioner raises for the first time in this petition a number of new facts not contained in the record. The petitioner now states that a large number of estates with escheatable interests have been probated under the amended Act within the Ninth Circuit. Pet. at 16. Also, the petitioner now states that "we" have been informed by the Department of Interior that a portion of the amended version of Section 207 has been implemented. Pet. 12 n 4. These factors cannot now be presented to the Court for the first time. *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157 (1950).

Third, the Petitioner also incorrectly states that the estimated value of the escheated interests here ranged from $18.33 to $244.44. Pet.16. Had the Petitioner properly included Darlan D. Youpee as a party, he would have to state that Darlan D. Youpee, alone, had 25 parcels devised that escheated, some of which were valued as high as $305.56, $309.75 and $333.33. E.R.

30,40-44.

Fourth, the petitioner never developed the record to answer the respondents' statements within their pleadings (E.R. 4-5) of lack of due process for the decedent. Due process is as integral an element as the actual taking when considering the guarantees of the Fifth Amendment. The factors and elements of due process must be considered by this Court but the petitioner has not developed the record enough for such consideration.

In that the petitioner (1) has failed to name essential parties, (2) seeks now to supplement the record with new facts, (3) incorrectly states the record as to the value of devised parcels and (4) has failed to complete the record as to due process given the decedent, this case is too procedurally flawed to be effectively considered by this Court at this time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

Rene A. Martell
Counsel of Record
Montana Legal Services
P.O. Box 409
Poplar, MT 59255
(406) 768-3006

Daniel L. Minnis
Montana Legal Services
P.O. Box 627
Browning, MT 59417
(406)338-7623

Attorneys for Respondents

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In the Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Respondents argue that the Ninth Circuit correctly held that the escheat of *de minimis* fractional interests in allotted Indian land under Section 207 of the amended Indian Land Consolidation Act (ILCA), 25 U.S.C. 2206, violates the Just Compensation Clause of the Fifth Amendment. For the reasons stated in the petition (at 11-15), we disagree.

Respondents suggest (Br. in Opp. 5-6) that their decedent had an absolute right to devise the fractional interests by virtue of Section 5 of the General Allotment Act, 25 U.S.C. 348 (which provides that an allotment shall be held in trust for the benefit of the original allottee "or, in case of his decease, of his heirs according to the laws of the State or Territory

where such land is located"), and 25 U.S.C. 373 (which provides that the owner of an interest in a trust allotment "shall have the right * * * to dispose of such property by will"). Those statutory provisions, however, merely set forth the law of testate and intestate succession that are applicable unless and until they are raised or superseded by other Acts of Congress, such as the ILCA. They create no special vested rights in particular rules of devise or intestate succession that are beyond the power of Congress to alter. See, *e.g.*, *Jefferson* v. *Fink*, 247 U.S. 288, 293-294 (1918); *Hodel* v. *Irving*, 481 U.S. 704, 712, 717 (1987).

Respondents also advance the argument, not relied upon by the court of appeals, that, because the ILCA prohibits intestate descent of fractional interests in allotted lands, "an entire class of Indian decedents who are under twenty-one [and therefore precluded from making wills] are foreclosed from devising their 2% interests or allowing them to descend." Br. in Opp. 7-8; see Pet. App. 22a (referring to argument).[1] Respondents, however, have no standing to assert the rights of Indian decedents who are minors, or their heirs. Respondents' decedent was 76 years old when he died, see Pet. App. 27a-28a, and he had ample opportunity to and did execute a valid will. If there are doubts about the constitutionality of the ILCA as applied to decedents who were minors when they died, that claim should be made by the heirs or devisees of such decedents, not by respondents. Even if the ILCA were unconstitutional as applied to such individuals,

[1] Under 25 U.S.C. 373, the age at which a person who has any interest in a trust allotment may dispose of such property by will is 18, not 21, as respondents assert. See Pet. App. 22a.

that would provide no basis for refusing to apply it in this case.

2. Respondents also argue (Br. in Opp. 8-10) that this case is procedurally flawed, because the certiorari petition fails to list two of the respondents as parties to the proceeding in the court of appeals. See Sup. Ct. R. 14.1(b). In respondents' view, "because Darlan D. Youpee and Williamette [Y. Bussard] are not named as respondents, this Court is not vested with jurisdiction over them," and they "are vested with a final judgment from the Ninth Circuit that is not reviewable." Br. in Opp. 9.

We acknowledge that the petition is incorrect in this regard, and that the two individuals—Darlan D. Youpee and Williamette Y. Bussard—were plaintiffs in the district court proceeding and appellees in the court of appeals. We regret the error.[2] Nonetheless, that error has no effect on the jurisdiction of this

[2] At Pet. 7 n.2, we described the allotment interests of the four named respondents that escheated. In addition, all of the four allotment interests bequeathed to Williamette Y. Bussard escheated and 20 of the allotment interests bequeathed to Darlan D. Youpee (the residual beneficiary, see Pet. App. 33a), escheated. E.R. 30, 40-44. In addition, at Pet. 16, we discussed the nature and value of the parcels that would have escheated. When the parcels bequeathed to Williamette Y. Bussard and Darlan D. Youpee are considered in the calculation, the figures change slightly. Thus, the interests that would have passed to all respondents but that instead escheated under the ILCA range from .05% to 1.67% of the parcel involved, see E.R. 40, 19; their average annual income for the preceding five years ranged from zero to $12.55, see E.R. 18, 42; and the estimated value of the escheated interests that have a defined cash value ranged from $2.69 to $333.33, see E.R. 42. See also E.R. 41, 42, 43, 44 (listing parcels whose value is listed only as "nominal").

Court, on the identities of the parties before the Court, or on the questions presented in this case.[3]

Under Rule 12.6 of the Rules of this Court, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court," and "[a]ll parties other than the petitioner are considered respondents." See, *e.g.*, *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783-784 n.14 (1980). Accordingly, regardless of whether they were named in the petition, Darlan D. Youpee and Williamette Y. Bussard are parties respondent to this proceeding, see Robert L. Stern et al., *Supreme Court Practice* 323-325 (7th ed. 1993), and are not "vested with a final judgment from the Ninth Circuit that is not reviewable." Br. in Opp. 9. The cases on which respondents rely (*id.* at 9-10) in arguing that the petition must be dismissed concerned the omission of a necessary party from a notice of appeal filed in district court, see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), and the failure of a party aggrieved below to file an appeal in this Court, see *Hartford Accident & Indem. Co.* v. *Bunn*, 285 U.S. 169 (1932). Those cases have nothing to do with the jurisdiction of this Court over a timely filed petition for a writ of certiorari, and they do not suggest that a party not named as a respondent in a certiorari petition thereby loses that party's status as respondent in this Court.

[3] Because they were represented below by the same counsel as the four respondents who were listed in the petition, they were properly served with the petition and have had the same opportunity to respond to the petition as have the other four respondents.

In any event, even if the two respondents whose names were omitted were not parties to the proceedings in this Court, it would not affect the Court's jurisdiction over the case or the legal issues it presents. Interests in land that William Youpee attempted to devise to each of the four respondents who were named in the petition escheated under the ILCA. See Pet. 7 n.2. The district court and court of appeals held that those escheats were unconstitutional. Thus, the question of the constitutionality of the ILCA would be squarely before this Court, even if the two additional respondents were not parties.

As we explain in the certiorari petition (at 14-17), that question warrants review by this Court. The court of appeals has held an Act of Congress unconstitutional. That ruling calls into question the settlements of thousands of estates involving escheatable interests in the Ninth Circuit alone, disrupts the ongoing implementation of this important remedial statute, and thereby frustrates Congress's efforts to address the pressing problem of fractionated ownership of Indian lands.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1996

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(4)

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WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
ANNE S. ALMY
ROBERT L. KLARQUIST
ANDREW C. MERGEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

51pp

QUESTION PRESENTED

Whether Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, which limits descent and devise of certain minor fractional interests in Indian lands, results in a taking of private property without the payment of just compensation in violation of the Fifth Amendment to the Constitution.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Cary G. Youpee, Allen F. Youpee, Helen Youpee Ricker, Darlan D. Youpee and Williamette Y. Bussard were plaintiffs/appellees in the courts below.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1595

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 67 F.3d 194. The opinion of the district court (Pet. App. 13a-26a) is reported at 857 F. Supp. 760.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. A petition for rehearing was denied on December 5, 1995. Pet. App. 41a-42a. On February 23, 1996, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 3, 1996. The petition for a writ of certiorari was filed on April 3, 1996, and

was granted on June 3, 1996 (116 S. Ct. 1874). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N] or shall private property be taken for public use, without just compensation.

2. Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, provides:

> (a) Escheat to tribe; rebuttable presumption
>
> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interests represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of the decedent's death. Where the fractional interest has earned its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

> (b) Escheatable fractional interest
>
> Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.
>
> (c) Adoption of Indian tribal code
>
> Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

STATEMENT

1. Pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and other federal statutes dating back to the end of the 19th century, much of the land on Indian reservations was allotted in trust or restricted status to individual Indians.[1] The allotment

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[1] "[A]llotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian ('trust' allotment) or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment)." *Felix S. Cohen's Handbook of Federal Indian Law* 615-616 (1982 ed.). For purposes of this brief, there is no distinction between trust allotments and restricted fee allotments. Our references to "trust allot-

acts' intent was to divide tribal landholdings into parcels to be allotted to individual Indians, thereby hastening the development of independent farmers and Indian assimilation into the surrounding non-Indian society. *Hodel* v. *Irving*, 481 U.S. 704, 706 (1987) ("This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society' ") (citing *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984)).

Under the allotment acts, each member of the tribe typically received a parcel of 160, 80, or 40 acres, depending upon his marital status and age and the type of land involved. The remaining reservation land was to be opened for settlement by non-Indians. General Allotment Act, ch. 119, § 1, 24 Stat. 388. In order to protect the allottees against improvident alienation of their land and to preserve for a generation its tax-exempt status, Section 5 of the General Allotment Act provided that an allotted parcel was to be held in trust for a period of 25 years or such further period as the President might prescribe. 24 Stat. 389. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980). Although the Act made no provision for devise, it did provide for descent; succession to the allotment interests was determined by Section 5's provision that, if the original allottee should die, the land would continue to be held in trust for "his heirs according to the laws of the State or Territory where such land is located." 24 Stat. 389; see 25 U.S.C. 348. The right of devise was added by the Act of June

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ments" or "trust lands" should therefore be understood to refer to restricted fee allotments as well.

25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373. See F. Cohen, *Handbook of Federal Indian Law* 220 (1942).

The allotment policy "quickly proved disastrous for the Indians." *Hodel* v. *Irving*, 481 U.S. at 707. As a result of the allotment policy, "Indian land holdings were reduced from 138 million [acres] in 1887 to 48 million in 1934, a loss of 90 million acres." *Felix S. Cohen's Handbook of Federal Indian Law* 138 (1982 ed.). The remaining Indian owners "evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals." *Hodel* v. *Irving*, 481 U.S. at 707. By the early 1900s, Congress began to provide for the extension of the trust period. See, *e.g.*, Act of June 21, 1906, ch. 3504, 34 Stat. 326 (codified at 25 U.S.C. 391). Finally, in 1934, Congress repudiated the allotment policy by enacting the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* See *Mattz* v. *Arnett*, 412 U.S. 481, 496 n.18 (1973). To avoid further alienation of Indian lands to non-Indians, Congress also provided that tribal and individual lands then held in trust would continue in that status indefinitely. 25 U.S.C. 462.

2. One by-product of the allotment policy is what has become known as the "heirship problem." The ordinary incentives to landowners to avoid extreme and uneconomic fractionation of land interests were not present within the allotment system, perhaps because it was intended that, after a relatively brief period, the land would become fully subject to state law. As the House Report on the Indian Land Consolidation Act (ILCA), 25 U.S.C. 2201 *et seq.*, explained:

> Under the[] Allotment Acts, certain Indians received allotments (usually from 80 to 160 acres)

> with a restriction against alienation. If an Indian possessed of an allotment failed to make a will (and most Indians did not make wills), all heirs would inherit a fraction of this allotment. The allotment would then be owned in "undivided" interests because the heirs would own all of the allotment together instead of each person having a specific part of the allotment. In contrast, if the land was owned by a non-Indian in fee, the heirs would have the right to go into state court and ask for the land to be partitioned either for sale or in kind. They would then receive either their share of the proceeds from the sale of the tract inherited, or receive a specific part of the land which they could then sell to whomever they wanted. However, if the tract of land is owned by Indians in trust or restricted fee, courts have interpreted the law as to allow partition only if all the heirs agree to it.

H.R. Rep. No. 908, 97th Cong., 2d Sess. 10 (1982); see also Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* Pt. 1, at 3 (Comm. Print 1960) (*1960 Survey*).

Other incentives that operate to discourage extreme fractionation of land interests also fail to operate in the setting of allotted Indian trust lands. For example, the owners of small interests in non-Indian land must ordinarily organize themselves to see to it that each owner pays a fair share of the state real estate taxes. Such organization is difficult, and the result is often that land with highly fractionated ownership is ultimately sold to pay back taxes. Because Indian lands are not subject to state real estate taxes, however, see, *e.g.*, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168-171

(1973); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), this incentive to avoid fractionation cannot operate.

As the individual interests in allotments passed down through successive generations of the original allottees' descendants, they were therefore splintered into multiple undivided interests, making the property costly to administer and difficult to put to productive use. *Hodel* v. *Irving*, 481 U.S. at 708-709, 712-713. As early as 1934, John Collier, the Commissioner of Indian Affairs, observed:

> [T]he Indian Service is forced to expend millions of dollars a year. The expenditure does not and cannot save the land, or conserve the capital accruing from the land sales or from rentals. * * * For the Indians the situation is necessarily one of frustration, of impotent discontent. They are forced into the status of a landlord class, yet it is impossible for them to control their own estates; and the estates are insufficient to yield a decent living, and the yield diminishes year by year and finally stops altogether.

Readjustment of Indian Affairs: Hearings on H.R. 7902 of the House Comm. on Indian Affairs, 73d Cong., 2d Sess. Pt. 4 , at 117-118 (1934). As this Court remarked in *Hodel*, the extent of fractionation has become "extreme." 481 U.S. at 712.

3. As early as 1928, it had been recognized that a serious problem of land fractionation had developed with respect to individual trust lands. See L. Meriam, Institute for Government Research, *The Problem of Indian Administration* 40-41 (1928). As a start toward resolving those problems, the IRA confined

the descent or devise of restricted lands to the tribe itself, members of the tribe, heirs or lineal descendants of the decedent, and other Indians for whom the United States may hold land in trust. 25 U.S.C. 464. That provision was intended to "make[] a beginning in the solution of the inherited-land problem." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

Thereafter, by the Act of November 24, 1942, ch. 640, § 1, 56 Stat. 1021, Congress provided that if an Indian holder of trust or restricted lands or an interest therein has died intestate without heirs, the lands or interest, together with accumulated rents, issues or profits, "shall escheat to the tribe owning the land at the time of allotment" or to a successor tribe. 25 U.S.C. 373a. See H.R. Rep. No. 523, 77th Cong., 1st Sess. (1941); S. Rep. No. 1355, 77th Cong., 2d Sess. (1942).

Ownership of the existing allotted lands, however, continued to splinter, exacerbating the problems recognized in the 1920s. Comprehensive studies of those problems were conducted in 1960 by the responsible committees in both the House of Representatives and the Senate. See *1960 Survey*. Additional hearings were held in 1966. *Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. (1966). Congress finally took action to address the problem when it enacted the ILCA, Pub. L. No. 97-459, Tit. II, 96 Stat. 2517 (1983). See *Hodel* v. *Irving*, 481 U.S. at 706-709.

As initially enacted, Section 207 of the ILCA, 25 U.S.C. 2206 (1982), entirely eliminated the inheritability of minor fractional interests in Indian trust

land. The statute provided that undivided interests representing 2% or less of the acreage of a tract and earning less than $100 in the year prior to the owner's death could not pass by devise or descent, but would escheat to the tribe upon the owner's death. In *Hodel* v. *Irving*, this Court held that that provision of the ILCA violated the Just Compensation Clause of the Fifth Amendment. 481 U.S. at 718.

4. In 1984, while *Hodel* v. *Irving* was working its way to this Court, Congress amended Section 207 of the ILCA. The amendment made three changes of significance for present purposes.

First, unlike the original Section 207, which abolished descent and devise of fractional interests even when it would result in consolidation of interests in a parcel of land, the amended Section 207 permits the testamentary devise of a fractional interest in a parcel to someone who already owns an interest in the same parcel. 25 U.S.C. 2206(b).

Second, although the original Act provided for escheat of a fractional interest that represented 2% or less of the acreage in the parcel and "has earned to its owner less than $100 in the preceding year before it is due to escheat," 25 U.S.C. 2206 (1982), the amendment liberalized that provision. Under the amended Act, a 2%-or-smaller interest will escheat only if it is "incapable of earning $100 *in any one of the five years from the date of decedent's death.*" 25 U.S.C. 2206(a) (emphasis added). The amendment further provided that if the interest "has earned * * * less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning

$100 in any one of the five years following the death of the decedent." *Ibid.*[2]

Third, the amended Act provided that, notwithstanding the escheat provision of the ILCA, any Indian tribe could adopt its own code of laws governing the disposition of escheatable interests, subject to the Secretary of the Interior's approval. The Secretary could not, however, approve any tribal code "that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests." 25 U.S.C. 2206(c).

Although Section 207 had already been amended by the time this Court decided *Hodel*, all of the property at issue in *Hodel* had escheated under the original version of the Act. This Court therefore expressly declined to rule on the constitutionality of the amended Section 207. 481 U.S. at 710 n.1. This case squarely presents that issue.

5. Respondents Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, Helen Youpee Ricker, Williamette Y. Bussard, and Darlan D. Youpee are enrolled members of the Sioux and Assiniboine Tribes of the Fort Peck Reservation and are children of William Youpee, who died testate on October 19,

[2] As we explained in our brief in *Hodel* v. *Irving*, at 10 n.10 (No. 85-637), this provision read literally would seem to require that, in order not to trigger the rebuttable presumption, an interest must earn a minimum of $100 in all five of the years preceding the death of the allottee. However, the congressional intent was only to require that the interest earn $100 in at least one of the preceding five years. See 130 Cong. Rec. 31,715 (1984) (remarks of Rep. Udall). We have been informed by the Department of the Interior that it has implemented the amended version of Section 207 in conformity with that construction of the provision.

1990, at the age of 76. Pet. App. 7a, 27a-28a. William Youpee, also an enrolled member of the Fort Peck Tribes, owned undivided interests in allotted trust land on several Indian reservations. William Youpee's will bequeathed his entire interests in one or more allotments to a single devisee; the will therefore perpetuated the existing fractionation, but did not exacerbate it. Respondents were the devisees of those interests. *Id.* at 29a-33a.

On April 28, 1992, following a hearing at which he explained that certain of William Youpee's interests would escheat to various tribes under the amended ILCA, Administrative Law Judge (ALJ) Vernon Rausch in the Department of the Interior issued an order approving Youpee's will and decreeing the partial distribution of Youpee's estate. Pet. App. 27a-40a.[3] In his partial decree, the ALJ ruled that, under the amended ILCA, allotment interests bequeathed to each of the respondents escheated to the tribal governments of the Fort Peck, Standing Rock, and Devils Lake Sioux Reservations, where the allotments were located. *Id.* at 7a, 20a, 36a-39a. That decision was based on BIA certifications that Youpee had a 2% or less undivided interest in each of those allotments, that the allotments could not satisfy the "capable of earning $100 annually" requirement of the amended ILCA, and that the designated devisee was not an owner of an existing interest in that allotment. C.A. Excerpts of Record (E.R.) 18-44. Several interests in allotments left to respondent Helen

[3] Issuance of a final decree was postponed pending the determination of the status of Robert Martin, a Fort Peck Sioux, who claimed that William Youpee was his father. Pet. App. 20a.

Youpee Ricker would have escheated but for the fact that she was already the owner of an interest in those allotments. *Ibid.*[4]

Respondents appealed the decree of partial distribution to the Interior Board of Indian Appeals (IBIA), contending that escheatment of the fractional interests was unconstitutional. On August 25, 1992, the IBIA dismissed the plaintiffs' appeal on the ground that it was without jurisdiction to determine constitutional issues. Pet. App. 7a.

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[4] The only allotment interest bequeathed to Marvin K. Youpee, Sr., escheated, and all four of the allotment interests bequeathed to Williamette Y. Bussard escheated. One of the two interests in allotments bequeathed to Cary G. Youpee escheated. One of the two interests in allotments bequeathed to Allen F. Youpee escheated. The cases of Helen Youpee Ricker and Darlan D. Youpee are more complex. Two of the eight interests in allotments bequeathed to Helen Youpee Ricker escheated; four of the remaining six fractional interests were small enough to have escheated, but they did not escheat because Helen Youpee Ricker already owned an interest in those allotments. See 25 U.S.C. 2206(b); Pet. App. 34a, 37a (referring to interests bequeathed in Clause Fourteenth of decedent's will, including Hugh Eagle Bear, Lame Soldier, Little Head, and Bertha Little Head allotments). With respect to Darlan D. Youpee, the will named him as the devisee of two parcels of land, neither of which escheated. See Pet. App. 30a. He was also named, however, as the residual devisee. See *id.* at 33a. Twenty of the allotment interests that he would have inherited in that capacity escheated, although it appears that at least some additional allotment interests did pass to him as residual devisee. See *id.* at 39a. For purposes of the above calculations, the allotment interests that were bequeathed to the various respondents are described at Pet. App. 29a-33a. The allotment interests that escheated are described at E.R. 18-38, 40-44. For purposes of these calculations, we count the interests in surface and mineral rights to a single allotment as a single interest.

6. On February 5, 1993, respondents filed suit in the United States District Court for the District of Montana against the Secretary of the Interior, alleging that the amended ILCA violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution. The district court acknowledged that the amended ILCA "avoids the escheat of certain interests which may have been escheated under the original ILCA," and, "[t]o that extent, the impact of the regulation is mitigated." Pet. App. 25a. The court also acknowledged that the amended ILCA "corrects the defect [in the original Act] of abolishing devises which would result in consolidation." *Id.* at 23a; see *id.* at 25a. "To that extent," the court continued, "it further promotes the legitimate government interest here of ameliorating fractionation," which the court "agree[d] is a most serious problem." *Ibid.* The court nonetheless found it significant that, because the amended ILCA does not permit the devise of covered fractional interests to lineal descendants who do not already have an undivided interest in the same allotment, it "places many Indian land owners in the [position] of either devising land to a collateral heir or allowing the land to escheat to the tribe." *Id.* at 23a. For that reason, the court held that the amended ILCA violates the Just Compensation Clause, and it enjoined the escheat of the fractional interests at issue. *Id.* at 25a.[5]

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[5] Consistent with our position in *Hodel* v. *Irving*, we do not believe that a cause of action is available against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, to obtain compensation for any taking that might occur in situations like the one presented here. In our brief in *Hodel* v. *Irving*, we noted that the legislative history of the ILCA "strongly reflects Congress's intent that the Act not result

7. The court of appeals affirmed. Pet. App. 1a-12a. Although it agreed that language in *Hodel* v. *Irving* "supports the Government's position that the United States can restrict the descent of fractional interests * * * [and] also suggests that a law requiring a decedent to choose one heir to inherit each fractional interest may be constitutional," *id.* at 11a, the court concluded that the "nature of the Government's regulation of the decedent's land" goes too far by confining the class of eligible devisees to "a very limited group" that, the court believed, "is unlikely to contain any lineal descendants," *id.* at 10a, 11a-12a.[6] The court stated that, because "[t]he amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel," it "continues to completely abolish one of the sticks in the bundle of rights." *Id.* at 12a. The court therefore held that the amended Act violates the Just Compensation Clause.

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in any cost to the United States," and took the position that a cause of action under the Tucker Act therefore is unavailable. Brief for the Appellant at 25 n.16 (No. 85-637). Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019 (1984). The Court apparently agreed, for its holding that the unamended Section 207 violated the Just Compensation Clause necessarily rested on the premise that compensation was not available. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985).

[6] The court did not advert to the fact that one of the respondents—Helen Youpee Ricker—is a child of William Youpee and avoided escheat of several parcels because she already owned an interest in them. See note 4, *supra*.

SUMMARY OF ARGUMENT

The court of appeals held the amended Indian Land Consolidation Act unconstitutional. The amendments to the Act substantially mitigate its impact on an individual Indian's ability to pass property by devise or descent, thereby ameliorating the constitutional defects that this Court found in the original version of the statute in *Hodel* v. *Irving*, 481 U.S. 704 (1987). The court of appeals' decision unduly expands the scope of this Court's holding in *Hodel* v. *Irving*, thereby creating new limits on the historical ability of the United States and other sovereigns to regulate the disposition of property at death without implicating the Fifth Amendment guarantee of just compensation.

In *Hodel* v. *Irving*, this Court examined an earlier version of the statute at issue here using the familiar three-part inquiry that considers the economic impact of the legislation, the investment-backed expectations of the regulated parties, and the character of the governmental action. 481 U.S. at 714. The Court found that the first two factors generally supported the statute's constitutionality and that, in addition, the fact that the statute gave those on whom it imposed costs an average reciprocity of advantage also supported its constitutionality. The Court held, however, that because the character of the legislation included the complete and total elimination of a landowner's ability to dispose of certain *de minimis* property by descent or devise, the amended Act violated the Fifth Amendment's Just Compensation Clause. *Id.* at 716, 718.

The amended Act permits the devise of fractionated interests in allotments that would otherwise escheat,

so long as they are devised to persons who already own an interest in the allotment. As a result of that change, the statute no longer suffers from the defect of entirely eliminating the inheritability of minor fractional interests in allotted trust land. Moreover, the statute's restriction on the inheritability of minor fractional interests is now much more precisely calibrated to the purpose it serves; devise is now permitted precisely in those cases in which it would promote the statutory goal of consolidating minor fractional interests. The amended Act thus remedies the flaws identified by this Court in the original legislation. Moreover, the amended Act is strongly supported by the long-established principle, expressly reaffirmed by this Court in *Hodel* v. *Irving*, that the sovereign has broad authority over the rules of descent and devise. The court of appeals therefore erred in holding Section 207 of the ILCA unconstitutional.

ARGUMENT

SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED, DOES NOT RESULT IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, IN VIOLATION OF THE FIFTH AMENDMENT

I. AS THE COURT RECOGNIZED IN *HODEL* V. *IRVING*, EXTREME FRACTIONATION OF INTERESTS IN ALLOTTED TRUST LANDS IS A GRAVE PROBLEM

In *Hodel* v. *Irving*, 481 U.S. 704, 712 (1987), this Court recognized that the fractionation of Indian lands is "extraordinary and may call for dramatic action to encourage consolidation." That conclusion

was apt. The degree of fractionation, characterized at the time of *Hodel* v. *Irving* as "extreme," *ibid.*, remains extraordinary. Moreover, the difficulties of making productive use of land with such fractionated ownership are so severe, and the costs of maintaining the land interests are so high, that the persistence of such fractionated interests through the generations threatens the reservation communities.

A. In *Hodel* v. *Irving*, this Court discussed the extreme level of fractionation of allotted Indian trust lands. The Court noted that 40-acre tracts on one reservation "are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent." 481 U.S. at 712. The Court adverted to one 40-acre tract that had a value of $8,000 and that produced an income of $1,080 annually. That tract had "439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1." *Id.* at 713. With respect to that tract, "[t]he smallest heir receives $.01 every 177 years," and that heir's interest worked out to a value of $.000418. *Ibid.* Yet the costs of administering the tract were estimated at $17,560 annually. *Ibid.*[7] See also Lawson, *Heirship: The Indian Amoeba*, *reprinted in Hearing on S. 2480 and S. 2663 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 77-104 (1984); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 711-713 (1971).

A 1992 study by the General Accounting Office of land ownership on 12 reservations confirms the

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[7] The Bureau of Indian Affairs (BIA) has informed us that as much as 75% ($33 million) of its 1994 realty budget went to administering fractional interests in allotted lands.

Court's assessment that the problem is extraordinary.[8] For example, on the Wind River Reservation, the largest of those studied, there are 4,228 tracts of allotted land. Of those, one has more than 300 co-owners, 145 have between 101 and 300 owners, 270 have between 51 and 100 owners, 371 have between 26 and 50 owners, 611 have between 11 and 25 owners, and 561 have between three and ten owners. GAO, *Indian Programs: Profile of Land Ownership at 12 Reservations* 9, 14 (Feb. 1992) (*GAO Study*). On the Wind River Reservation, the most fractionated tract of land has 322 owners. *Id.* at 16. The smallest individual ownership interest is .00001 of an 80-acre tract, which is equivalent to an ownership of .35 square feet (or an area 7.1 inches x 7.1 inches) if the land were partitioned. *Id.* at 20. The same pattern exists at most of the reservations studied, including the Fort Peck and Standing Rock Reservations[9]—

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[8] We have lodged copies of the GAO study with the Court.

[9] On the Fort Peck Reservation, there are 6,896 tracts of land. Of those, one has more than 300 co-owners, 31 have between 101 and 300 owners, 179 have between 51 and 100 owners, 422 have between 26 and 50 owners, 987 have between 11 and 25 owners, and 1,447 have between three and ten owners. *GAO Study* 9, 14. The most fractionated tract of land has 345 owners. *Id.* at 16. The smallest individual ownership interest is .00012 of a 40-acre tract, which is equivalent to an ownership of 2.09 square feet (or an area 17.4 inches x 17.4 inches) if the land were partitioned. *Id.* at 20. On the Standing Rock Reservation, there are 9,267 tracts of land. Of those, ten have more than 300 co-owners, 111 have between 101 and 300 owners, 414 have between 51 and 100 owners, 858 have between 26 and 50 owners, 1,640 have between 11 and 25 owners, and 1,958 have between three and ten owners. *Id.* at 9, 14. The most fractionated tract of land has 542 owners. *Id.* at 16. The smallest individual ownership interest is .0000025 of a 320-acre tract, which is equivalent to an ownership of .35 square feet (or an area 7.1 inches x 7.1 inches) if the land were partitioned. *Id.* at 20.

two of the three Reservations on which the land at issue in this case is located.[10]

B. The result of the extreme fractionation of land interests has been the "disuse of millions of acres of real property." *The Indian Amoeba* 77. The difficulties of making productive use of trust allotments with highly fractionated ownership are severe. The economic value of those lands could ordinarily be realized in three ways: by leasing its mineral rights (if any) or leasing the surface estate for farming or grazing purposes, by selling the land, or by the owner's using the land for agriculture or mineral extraction. Each of those possibilities faces serious obstacles where the ownership interests are so highly fractionated.

Leasing the land is a difficult process. Under ordinary principles of property ownership, each owner of an undivided interest in a parcel of land must agree to any lease of that land. That is because each owner of a tenancy in common (the dominant form of co-ownership) "has the right to use and enjoy the entire property as if he were the sole owner," 4A *Powell on Real Property* ¶ 603[1], at 50-15 (June 1996), and a potential lessee therefore cannot obtain the exclusive

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[10] In this case, the interests that would have passed to all respondents, but that instead escheated under the ILCA, range from .05% to 1.67% of the parcel involved, see C.A. Excerpts of Record (E.R.) 19, 40; their average annual income for the preceding five years ranged from zero to $12.55, see E.R. 18, 42; and the estimated value of the escheated interests that have a defined cash value ranged from $2.69 to $333.33, see E.R. 42. See also E.R. 41, 42, 43, 44 (listing parcels whose value is identified only as "nominal").

right to use the property unless the lessee separately obtains that right from each tenant in common. Where literally hundreds of owners may be involved, the difficulty of finding them all and obtaining their consent to a contract of lease can be enormous. The burden is compounded by the fact that among the dozens or hundreds of owners of a trust allotment may be members of a number of different tribes, non-Indians, and children adopted out of the tribe, and that various owners may live off the reservation, in other parts of the United States, or even in Canada. See *The Indian Amoeba* 88. The GAO study confirms the problem. On the 12 reservations studied, there were 36,134 tracts with multiple ownership. Of those tracts, 26 had more than 300 owners, 835 tracts had 101-300 owners, 2,391 had 51-100 owners, 4,944 had 26-50 owners, 9,628 had 11-25 owners, 13,553 had 3-10 owners, and only 4,757 had two Indian owners. *GAO Study* 14. Finally, those owners whose interests are very small are particularly unlikely to respond to mailings or otherwise expend any effort to see to it that the land is managed effectively. See *The Indian Amoeba* 88. Once again, on the 12 reservations included in the GAO study, interests of 2% or less accounted for 431,074 (or more than 60%) of the 704,562 identified ownership interests. *GAO Study* 19.

Under these conditions, obtaining the agreement of numerous owners to agricultural or mineral leases is often impossible. Although the owners of a majority interest in a parcel of land may enter into an agricultural lease without obtaining the consent of all of the owners, 25 U.S.C. 3715(c)(2), even obtaining such majority consent can pose formidable obstacles when the ownership interests are highly fractionated.

Where the land is not in use by any of the owners and the heirs have been unable for a three-month period to agree on a lease, the Secretary of the Interior may enter into leases on their behalf. See 25 U.S.C. 380; 25 C.F.R. 162.2. But that process is cumbersome and the burden on the government is great. As a result of the complexity and lack of flexibility in the process, although leases may ultimately be executed, they may not ensure that given parcels of land are used most efficiently and that their value is realized in the way that the individual owners and their communities would prefer. See *Indian Heirship Land Problem*, 46 Wash. L. Rev. at 718-719.

C. Difficulties with highly fractionated ownership are not unknown in other property law contexts. They are ordinarily resolved, however, "by either physically dividing land among heirs [partitioning], so that each parcel then becomes a separate estate, or selling the property and dividing the proceeds." *The Indian Amoeba* 78.[11] Neither of those alternatives,

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[11] Under ordinary legal principles applicable to lands not held in trust for Indians, "[e]very tenant in common has an inherent right to compel partition." 4A *Powell on Real Property*, *supra*, ¶ 607[1], at 50-43. See also *id.* at 50-43 n.3 (compiling state partition statutes). Although property is sold only when the tenants in common agree or when partition in kind would be prejudicial to their interests, *id.* ¶ 607[4], at 50-54 to 50-55, "[m]ost partitions today are * * * in the form of sale and division of the proceeds," *id.* at 50-58. A typical statutory scheme governing partition is that of Montana, where the decedent in this case resided. Any tenant in common may bring an action for partition. Mont. Code Ann. § 70-29-101 (1995). If "the property or any part is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof." Mont. Code Ann. § 70-29-202(1) (1995). The statute provides that, "otherwise,

however, is satisfactory in the case of trust allotments. Sale of the allotment by its owners (which, in any event, requires the approval of the Secretary of the Interior, see, *e.g.*, 25 C.F.R. 152.22), is more difficult even than leasing the tract, because there is no provision for sale of the tract as a whole by the owners of a majority interest. Cf. 25 U.S.C. 379, 404, 483 (referring to sales on behalf of "heirs" or "Indian owners"); 25 C.F.R. 152.17 (providing for sale "by the Indian owner with the approval of the Secretary or by the Secretary with the consent of the Indian owner"). Moreover, in light of the history of the alienation of Indian lands to non-Indians, see p. 4, *supra*, and the purpose of the trust relationship (especially since the passage of the Indian Reorganization Act) to prevent such alienation from occurring, see *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992); S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934), the government is cautious before permitting the sale of parcels of Indian trust lands.

Nor does partitioning the land provide a practical solution. It has generally been assumed that, in the absence of specific statutory authority to the contrary, partition is permissible only with the unanimous agreement of the owners. See, *e.g.*, H.R. Rep. No. 908, 97th Cong., 2d Sess. 10 (1982); Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* Pt. 1, at 3-4 (Comm.

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* * * [the court] must order a partition according to the respective rights of the parties." *Ibid.* If the property is sold, the proceeds of the sale are distributed among the tenants in common, after the amounts necessary to cover the costs of sale and satisfy any liens are deducted. Mont. Code Ann. § 70-29-321 (1995).

Print 1960) (*1960 Survey*). The statutes codified at 25 U.S.C. 372 and 378 grant authority to the Secretary of the Interior to partition trust lands if to do so would be "to the advantage of the heirs." But that authority has been held to be limited by 25 U.S.C. 464, which provides that, with certain exceptions, "no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved." See *Sampson* v. *Andrus*, 483 F. Supp. 240 (D.S.D. 1980). In any event, most allotted land is useful only for grazing or mineral exploitation. Partitioning such land into very small parcels that are not economically viable would not appear to be to the advantage of the owners. See *1960 Survey* 8 ("it is not economically feasible, if it ever was, to divide the lands into smaller parcels").

D. The extreme fractionation of allotted lands imposes substantial costs both upon the owners of the tracts involved and upon the community. As the Senate Committee explained when it reported on the amendments to the Indian Land Consolidation Act, among the consequences of the fractionated land ownership pattern are:

> (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA because [of] the inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indian[s] or non-member Indians, (6) inability to

> control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons ow[n]ing any undivided interest in property.

S. Rep. No. 632, 98th Cong., 2d Sess. 3 (1984). As a result, allotments owned by numerous heirs often cannot be put to their most economic use, and some tracts are left in a state of quasi-abandonment because of difficulties experienced by the BIA in obtaining agreement of the owners to lease the land. H.R. Rep. No. 908, *supra*, at 10-11, 13. The problem has enormously deleterious consequences for the owners of the property and the community as a whole.

II. THE AMENDED VERSION OF SECTION 207 IS CONSTITUTIONAL UNDER THE *PENN CENTRAL* ANALYSIS EMPLOYED BY THE COURT TO ANALYZE THE ORIGINAL VERSION IN *HODEL V. IRVING*

In *Hodel* v. *Irving*, this Court held that an earlier version of the Indian Land Consolidation Act was unconstitutional because it effected a taking of private property without just compensation. The Court analyzed the provisions of the original Act in accordance with the three-part inquiry derived from *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

A. Economic Impact

The Court in *Hodel* v. *Irving* noted that the original Act's economic impact on property owners "can be substantial," 481 U.S. at 714, since the remainder interest in the property—which is the property interest that goes to the tribe when the escheat takes place—may constitute a substantial

portion of the value of the property, *id.* at 715. Because the amended version of the Act provides further safeguards to ensure that property interests with substantial value do not escheat, the amended Act has a lesser economic impact than did the original version.

The version of the Act before the Court in *Hodel* required escheat of fractional interests of less than 2% that had "earned to its owner less than $100 in the preceding year before it is due to escheat." 481 U.S. at 709. In analyzing the economic impact of that provision, the Court specifically adverted to the possibility that "the failure to 'look back' more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests." *Id.* at 714. Even very valuable property interests may fail to generate income in a given year, and the original Act's rigid use of a one-year frame of reference could thus exacerbate the economic impact of the escheat.

The amended Act employs a much more flexible standard to ensure that a property interest is genuinely *de minimis* in value before it escheats. The 1984 amendments replaced the rigid $100-in-the-prior-year limitation with a standard that gives rise to a rebuttable presumption in favor of escheat only if the property "is incapable of earning $100 in any one of the five years from the date of decedent's death." 25 U.S.C. 2206(a). See p. 9 & n.2, *supra*. That standard ensures that only interests that are truly minor—and the maintenance of which therefore requires a disproportionately large administrative cost—will escheat.

B. Investment-Backed Expectations

In *Hodel* v. *Irving*, the Court stated that "[t]he extent to which any of [the parties] had 'investment-backed expectations' in passing on the property is dubious," because their interests were "overwhelmingly acquired by gift, descent, or devise," and the land was "generally held for lease rather than improved and used by the owners." 481 U.S. at 715. That continues to be true of the amended Section 207, as the court of appeals in this case concluded, Pet. App. 10a, and it supports the constitutionality of the Act. See 481 U.S. at 715.

C. Character Of The Governmental Action

In *Hodel* v. *Irving*, the Court noted that the "character of the governmental action" had two aspects. First, the fact that there was some "average reciprocity of advantage" when small fractional interests are consolidated in the hands of the decedent's tribe "weigh[ed] weakly in favor of the statute." 481 U.S. at 715. The Court stated that, if the analysis were terminated at that point, the Court "might well find [the unamended] § 207 constitutional." *Id.* at 716. But the fact that the original Act amounted to a "complete abolition," *id.* at 717, of the right to transfer property to individuals of one's choice at death tipped the scales to require a finding of unconstitutionality. The 1984 amendments to the Act substantially remedy the defects in the version of the Act that was before the Court in *Hodel* v. *Irving* by making the right of devise available when it would not result in the perpetuation or exacerbation of the fractionation. In addition, the amended Act gains support from the long-standing principles, reaffirmed in *Hodel* v. *Irving*, that the sovereign possesses very broad

authority over the right of descent and devise—and that Congress's authority as regards inheritance of Indian property is particularly broad. In light of those factors, the character of the governmental action under the amended Act does not warrant a holding that it violates the Just Compensation Clause.

1. *The amended Act continues to provide an average reciprocity of advantage.* The amended Section 207 continues to provide even the owners of fractional shares with the same "average reciprocity of advantage" provided by the original Act. *Hodel* v. *Irving*, 481 U.S. at 715 (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)). As the Court explained in *Hodel*, "[c]onsolidation of Indian lands in the Tribe benefits the members of the Tribe." 481 U.S. at 715. Although not all tribal members own escheatable interests, there is "substantial overlap between the two groups." *Ibid.* In addition, "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." *Id.* at 716. The fact that the amended Act continues to offer benefits to those who also must bear its costs cuts in favor of its constitutionality.

2. *The amended Act does not affect the right to use or enjoy property, or the right to dispose of it through sale or gift.* It is of substantial significance in assessing the character of the governmental action to analyze the nature of the property interest that is being affected. The property right affected by Section 207 is not the right to the use or enjoyment of the property itself—or even so much of that right as can be realized by an owner of a 2%-or-less interest that is capable of generating less than $100 of annual

income. Section 207 leaves that right entirely untouched. Nor does Section 207 affect the right of the owner of a fractional interest that is subject to escheat under Section 207 to dispose of that interest by selling it, exchanging it, giving it away, or seeking to have it partitioned.[12] See 25 C.F.R. 152.17, 152.22(a), 152.25, 152.33. Compare *Andrus* v. *Allard*, 444 U.S. 51 (1979) (upholding Act of Congress that eliminated right to dispose of property for consideration). It follows that Section 207 is unlikely to have a substantial effect on the economic value of the fractional property interests it affects—a consideration that is highly relevant to the first prong of the *Penn Central* analysis. Given the variety of ways in which the property can be disposed of, however, it also follows that the character of the governmental action cannot be characterized as even a substantial elimination of the owner's right to dispose of property.

3. *Section 207 does not affect the right to pass the property at death through non-probate means.* The only component of the "bundle of sticks" that is affected by Section 207 is the right of the owner of a fractional interest to see to it that his interest passes at his death to family members or other individuals of his choice who do not already own an interest in the

[12] Because the land is held by the United States in trust, each of those transactions would of course require the approval of the Secretary of the Interior. But that is a consequence of legislation requiring the Secretary to look after the best interests of the owners, and there is no basis for believing that the Secretary's approval would be withheld where a sale, exchange, or gift transaction was genuinely in the best interests of the owner. In any event, Section 207 is separate from the general legal restrictions on alienation of trust lands without the Secretary's consent.

same property. Yet Section 207 does not entirely eliminate even that right. The owner of course retains the ability to acquire whatever additional interest in the tract would bring his total share above the 2% level necessary to avoid escheat. 25 C.F.R. 151.7. The owner also retains the ability to sell the property during his lifetime and transfer the proceeds of that sale to his heirs via descent or devise. More significantly, however, Section 207 affects only the extent to which the owner may use a particular mechanism to transfer his property at death to individuals of his choice—the mechanism of probate.[13]

[13] It may be inaccurate to characterize the amended Act as eliminating the right to transfer property by descent. The effect of escheat to the tribe is simply to designate by statute a particular heir—the tribe—for the minor fractional interests at issue. To be sure, it is unusual for an inheritance statute to designate a non-relative as an heir. But it may well be the case that many or most of the intestate Indians affected by the ILCA—with a lifetime's experience with the problems of extreme fractionation and an appreciation of the benefits of escheat to the tribal community and its members—would choose to leave their minor fractional interests to the tribe. Indeed, many of them may have been relying on the ILCA to do so. That is particularly true of decedents who, during their lifetime, took no part in managing or using the parcels of land in which they had an interest and who derived little or no income from that land. Moreover, it has long been recognized that "Indian lands were communal property" and that "every member of the community is an owner of it as such"—a type of organization of property that is "a thing unknown" elsewhere in this country. *Journeycake* v. *Cherokee Nation*, 28 Ct. Cl. 281, 302-303 (1893), aff'd, 155 U.S. 196, 207 (1894) (land held by Cherokees "as a nation, and no title was vested in severalty in the Cherokees, or any of them"); see also *The Cherokee Trust Funds*, 117 U.S. 288, 309 (1886); *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 745-746 (1835); see generally William Cronon,

The other familiar non-probate means by which individuals see to it that property is passed at death remain intact.

For example, an owner of a fractional interest may still give the interest to a friend or relative while retaining a life estate in order to ensure continued realization of whatever benefits accrue from ownership. 25 C.F.R. 152.25(d). Similarly, the owner may transfer the interest to a revocable trust on behalf of the desired beneficiary, while retaining a life estate. Such a trust may be as simple as a signed writing by the owner stating, "I hereby declare that I hold my fractional interests in [the parcel] in a revocable trust, for my benefit for my life, and on my death the interest is to go to [the beneficiary]." Jesse Dukeminier & Stanley Johanson, *Wills, Trusts, and Estates* 11 (5th ed. 1995); accord Ronald Chester, *Is the Right to Devise Property Constitutionally Protected?—The Strange Case of Hodel v. Irving*, 24 Sw. U. L. Rev. 1195, 1209 (1995) (stating that a revocable trust is generally "simpler than a will"). It surely is not inherently more complex than a will, see *Farkas* v. *Williams*, 125 N.E.2d 600 (Ill. 1955) (revocable trust need not be executed with all of the formalities of a will); *Coleman* v. *First Nat'l Bank*, 506 P.2d 86 (Nev. 1973); *Harvey* v. *Vigil*, 430 P.2d 874 (N.M. 1967), and an owner who is concerned about passing a fractional interest to individuals of his choice at his death can

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Changes in the Land 58-81 (1983) (study of concepts of landownership of Indians in eastern United States). That background supports the assumption that individuals with such small interests would not have objected to leaving them to escheat to the Tribe, for the benefit of the community as a whole.

therefore accomplish that purpose without running afoul of Section 207.[14]

4. *The amended Act does not entirely eliminate the right to pass property at death through devise.* Most significantly, unlike the version of the ILCA before the Court in *Hodel* v. *Irving*, the amended Act no longer entirely prohibits devise of minor fractional interests. In *Hodel* v. *Irving*, the Court emphasized that what "goes too far," 481 U.S. at 718 (quoting *Pennslyvania Coal Co.* v. *Mahon*, 260 U.S. at 415), is the "complete" and "total" "abrogation" of all rights of descent and devise.[15]

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[14] This Court in *Hodel* v. *Irving* stated that "[t]he fact that it may be possible for the owners of these [fractional] interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights [of passing the property by descent and devise] taken." 481 U.S. at 716. Although a revocable trust may not be an adequate substitute where a statute otherwise effects a "total abrogation of the right to pass property," *ibid.*, the availability of this mechanism is at least relevant to an assessment of the rights that are affected by the ILCA. And it may well be an "adequate substitute" for the rights that are affected by the amended Section 207, which no longer entirely eliminates the right to pass the property by devise.

[15] See 481 U.S. at 716 ("the regulation here amounts to *virtually the abrogation* of the right to pass on a certain type of property") (emphasis added); *ibid.* ("Even the United States concedes that *total* abrogation of the right to pass property is unprecedented") (emphasis added); *ibid.* ("this statute *effectively abolishes* both descent and devise") (emphasis added); *id.* at 717 ("a *total* abrogation of these rights cannot be upheld") (emphasis in original); *ibid.* ("*complete* abolition of both the descent and devise of a particular class of property may be a taking") (emphasis added); *ibid.* ("The difference in this case is

The amended Act provides that "[n]othing in this section shall prohibit the devise of * * * an escheatable fractional interest to any other owner of an undivided fractional interest in [the] parcel." 25 U.S.C. 2206(b). It therefore remedies the defect identified by the Court in *Hodel* v. *Irving* by permitting devise of property if the devisee already owns an interest in the same parcel. Indeed, in this very case, that provision operated to permit the devise of otherwise escheatable interests to respondent Helen Youpee Ricker because she already owned interests in the same property. See note 4, *supra*. In other cases, it would permit the devise of an escheatable interest to a number of persons, including—in the ordinary case—many relatives who can be expected to have fractional interests in the same allotments that have passed within a given extended family by inheritance from the original allottee.

Moreover, the specific context in which the amended Act permits devise is highly significant. In *Hodel* v. *Irving*, the Court concluded that the failure to fit the means to the end was a serious defect in the unamended Section 207. Specifically, the Court distinguished the case before it from others in which a legislature had acted to alter the rules of descent and devise by noting that "[t]he difference in this case is the fact that both descent and devise are completely abolished; indeed they are abolished *even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property*." 481 U.S. at 717-718 (emphasis added);

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the fact that both descent and devise are *completely* abolished") (emphasis added).

see also *id.* at 716 (noting that the unamended Act abolishe[d] descent and devise "even when the passing of the property to the heir might result in consolidation of property—*as for instance when the heir already own[ed] another undivided interest in the property*") (emphasis added).

By permitting devise precisely in those circumstances in which the statutory goal can be served—and eliminating it precisely in those circumstances in which the extreme fractionation would be perpetuated or exacerbated—the amended Section 207 avoids the defects of the unamended Act before the Court in *Hodel* v. *Irving*. In doing so, it gains support from the long line of cases that have recognized that it is consistent with the Just Compensation Clause for a legislature to exercise its broad authority to affect property interests where those interests have adverse effects on other owners of the property and others in the community. See, *e.g.*, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 125-127; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Miller* v. *Schoene*, 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). Although the unamended Act affected property interests more than was necessary to accomplish its goal, the amended Section 207 requires escheat of minor fractional interests only where permitting their descent or devise would perpetuate or exacerbate the grave social and economic problems caused by the existence of those minor fractional interests. Conversely, it permits devise where the effect would be to consolidate fractional interests and thereby contribute to elimination of those serious problems. The fact that Section 207

is now so carefully tailored to remedying the problem it addresses supports its constitutionality.[16]

5. *The amended Act's limitation on the right to dispose of property by devise is supported by the established principle that the sovereign has substantial authority to regulate the laws of inheritance.* The Court in *Hodel* v. *Irving* carefully "reaffirm[ed] the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. To hold the amended Act unconstitutional would contravene the principles underlying those cases and cast doubt upon a number of hitherto common practices that limit an

[16] The amended Act fares better than the version in *Hodel* v. *Irving* in another respect as well—albeit one on which the Court did not rely. As Justice Stevens pointed out in *Hodel* v. *Irving*, the original version of the Act "became effective the day it was signed into law"—January 12, 1983. 481 U.S. at 732 (Stevens, J., concurring in the judgment). Since the decedents in *Hodel* v. *Irving* died in March, April, and June, 1983, it was "not reasonable to assume that [the] decedents * * * had anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners." *Id.* at 732-733. By contrast, the decedent in this case had approximately six years between the time the amended Act was passed—October 30, 1984, see Pub. L. No. 98-608, § 1(4), 98 Stat. 3172—and his death on October 19, 1990. Accordingly, he had ample opportunity to "put [his] affairs in order," 481 U.S. at 733 (Stevens, J., concurring in the judgment), by making *inter vivos* transfers of his minor fractional property interests (or of remainder interests in those property interests) or otherwise disposing of them (including by devise to a person who already owned an interest in the same tracts), and thereby avoiding escheat.

individual's right to pass property at his death—even among family members.

The authorities from this Court demonstrate the breadth of the sovereign's authority to alter the laws of descent and devise. In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898), for example, in the course of upholding a state inheritance tax, the Court explained that "[t]he right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions on it." Referring specifically to the "natural right in children to inherit the property of their parents," the Court has stated that it "know[s] of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good." *United States* v. *Perkins*, 163 U.S. 625, 628 (1896). And the authority of the government to alter the rules of inheritance extends to devise, as well as descent. The Court has specifically referred to "the power which every * * * sovereignty possesses, of regulating the manner and terms upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance," *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850), and has noted that "when [a State] grants [the privilege of passing property through descent or devise], it may annex to the grant any conditions which it supposes to be required by its interests or policy," *id.* at 494. See also *United States* v. *Fox*, 94 U.S. 315, 320 (1876) ("The power of the State to regulate the tenure of real property within her limits * * * and the rules of its descent, and the extent to which a testamentary disposition of

it may be exercised by its owners, is undoubted."); *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874) ("the law of descent and distribution may be moulded according to the will of the legislature" to govern estates of those not yet deceased).

Although the above cases do not specifically cite the Just Compensation Clause, this Court in *Hodel* v. *Irving* correctly understood their reasoning as affirming the sovereign's authority to act in the area of inheritance law "without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. Indeed, the cases demonstrate a broad recognition that no constitutional provision protecting property interests would preclude the sovereign from making reasonable adjustments in the law of descent and devise. Thus, in *Randall* v. *Kreiger*, the Court noted that it is only after an individual's death that the rights of the heirs or devisees "become fixed and vested," at which time those rights "rest upon the same foundation, and are protected by the same sanctions as other rights of property." 90 U.S. (23 Wall.) at 148. Presumably, those sanctions include the protections of the Just Compensation Clause. See also *United States* v. *Perkins*, 163 U.S. at 628 (stating that "we know of *no legal principle*" to prevent a legislature "from taking away or limiting" the right of testamentary disposition) (emphasis added).

Indeed, in *Irving Trust Co.* v. *Day*, 314 U.S. 556 (1942), the Court addressed a constitutional attack on a statute permitting a spouse to take a statutory share from an estate, even when that was apparently not the intent of the decedent (as expressed in the decedent's will) and the spouse had signed an antenuptial waiver of rights to the husband's property. The Court swept aside the Contract Clause and Due

Process Clause challenges to the statute in language directly applicable to this case:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution* forbids the legislature * * * to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Id. at 562 (emphasis added).

Pursuant to that power, States have frequently adjusted the rights of various parties to inherit property, even when such disposition of an individual's estate is directly contrary to the wishes of the decedent. Historically, the rights of dower and courtesy limited the ability to convey property. See 1 *Powell on Real Property* ¶ 109[1], at 6-11 to 6-13 (June 1996). A number of States continue to recognize those rights in various ways. Even under more modern codifications, however, the law imposes substantial restrictions on an individual's ability to pass property to whomever the individual chooses through probate proceedings. For example, the Uniform Probate Code provides that a surviving spouse or minor children are entitled to a "homestead allowance" of $15,000 from the decedent's estate, and that that allowance "is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share." Uniform Probate Code § 2-402 (1996). Where a decedent has an estate of $15,000 or less and is survived by a spouse or minor children, the effect of that provision is to

eliminate entirely *any* right to pass property through devise or descent in any other way or to any other party. Even for larger estates, the provision operates *pro tanto* to remove the authority of the decedent to pass the property it affects in any other way.

The same principle of broad sovereign authority over matters of descent and devise is applicable even to laws that restrict the right to pass property to one's spouse or lineal descendants. Impediments to inheritance such as alien citizenship, see *Clark* v. *Allen*, 331 U.S. 503 (1947); see also *Kolovrat* v. *Oregon*, 366 U.S. 187, 188 (1961), and illegitimacy under some circumstances, see *Shangreau* v. *Babbitt*, 68 F.3d 208 (8th Cir. 1995), cert. denied, No. 95-1619 (June 24, 1996), have also prevented devise or descent to a lineal descendant.

Congress's authority over the inheritance of Indian lands is particularly broad. In the specific context of Indian law, this Court has affirmed a decision upholding a statute that precluded lineal descendants of less than one-fourth Yakima blood from inheriting the restricted or trust estate of a decedent member of the Yakima Tribe. *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash 1965), aff'd, 384 U.S. 209 (1966). Although the focus of the district court's decision in *Simmons* was on Congress's authority to define tribal membership, the effect of the decision was the same as here: to preclude a decedent from passing property to his lineal descendants.

Indeed, the laws applicable to the inheritance of Indian lands have always been subject to change by Congress, even when those changes had very substantial effects on the disposition of property after the death of a decedent. As this Court explained in *Jefferson* v. *Fink*, 247 U.S. 288, 290 (1918), "[i]n early

times * * * it was held that while the tribal relation continued the applicable rule of descent was to be found in the laws and usages of the tribe." See also *Jones* v. *Meehan*, 175 U.S. 1, 19-32 (1899). Later, Congress altered that rule to make applicable the inheritance laws of the State or territory in which the land lay. *Jefferson* v. *Fink*, 247 U.S. at 290. As the Court recognized in *Jefferson*, however, "[l]ike other rules of descent," the rules applicable to devise and descent of Indian lands are "subject to change by the law-making power as to any land not already passed to the heir by the death of the owner." *Id.* at 294. Similarly, the General Allotment Act originally precluded devise and provided that allotments held in trust could pass only by descent in accordance with state or territorial law. § 5, 24 Stat. 389; see 25 U.S.C. 348. It was only 20 years later that Congress first granted allottees the right to pass property by devise. Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373.

When Congress enacted Section 207, it once again altered the law governing descent and devise of minor fractional interests, in effect making a single federal rule of descent—and a limitation on the right of devise—applicable to minor interests in Indian trust lands. In light of the limited nature of the intrusion on property rights, the close tailoring of the remedy in the amended Section 207 to the scope of the Indian heirship problem, and the long-standing principles granting the sovereign broad authority to alter the rules of inheritance, it cannot be said that Section 207 is the kind of extraordinary and unreasonable restriction that "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415.

III. THE AMENDED ACT IS IN ANY EVENT CONSTITUTIONAL AS APPLIED IN CASES OF INTESTATE SUCCESSION OR CASES IN WHICH A DEVISE WOULD EXACERBATE THE FRACTIONATION OF INDIAN LAND

Even if the amended Section 207 posed a constitutional problem under the Just Compensation Clause as applied to cases like this, in which the decedent died with a will that devised his minor fractional interests to his children without further fractionating those interests, it would pose no such problems in cases in which the decedent left a will that attempted to further fractionate the decedent's minor ownership interests or in cases in which the decedent died intestate. As applied in such cases, the amended Section 207 should be recognized as constitutional. Cf. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995).

First, even if the amended Section 207 continues to pose difficulties in cases like the present, it would not do so in cases in which the decedent dies intestate. Faced with the "serious public problem," *Hodel* v. *Irving*, 481 U.S. at 718, caused by the extreme fractionation of Indian lands, Congress reasonably can put landowners on notice that their ownership interests will not be further fractionated by operation of law and that some affirmative action by the owner is necessary to avoid escheat. As we noted above, moreover, there is every reason to suppose that Congress's specification of the tribe as the statutory heir of minor fractional interests accords with the wishes of many decedents who die intestate and therefore never state any intention to the contrary. See note 13, *supra*. To hold the Act unconstitutional in those

contexts threatens to upset—rather than fulfill—the expectations of decedents, without serving any substantial public purpose. This Court stated in *Hodel* v. *Irving* that "[i]t may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe." 481 U.S. at 718. Since Section 207 would have only that effect in many cases, it is constitutional as applied in those cases.

It is true that three of the four decedents in *Hodel* v. *Irving* itself died intestate, yet the Court nonetheless held the Act unconstitutional as applied to all four. In *Hodel* v. *Irving*, however, no argument was made that the Act's constitutionality should be assessed as applied to different categories of decedents, and the Court gave no indication that it had considered the possibility of ruling on the constitutionality of the Act based on an as-applied, rather than a facial, analysis. Moreover, because the unamended Section 207 was challenged so soon after it was enacted, see 481 U.S. at 728-733 (Stevens, J., concurring in the judgment), there was little possibility that the intestate decedents in *Hodel* v. *Irving* had had any opportunity to plan their estates or develop any particular expectation regarding how their minor fractional interests in trust lands would be disposed of upon their death. Where, however, an intestate decedent has had the time to develop such an expectation under the amended Section 207, there is no basis to upset that expectation by refusing to give effect to the amended Act as applied to such decedents. Accordingly, even if the amended Section 207 were unconstitutional as applied to decedents such as William Youpee in this case, it would remain

constitutional as applied to the estate of intestate decedents.

Second, Section 207 also operates to prevent devise of any single minor fractional interest to more than one individual. This Court stated in *Hodel* v. *Irving* that "[s]urely it is permissible for the United States to prevent the owners of such [minor fractional] interests from further subdividing them among future heirs on pain of escheat." 481 U.S. at 718. Therefore, in cases in which Section 207, as applied, has only that effect, it is a constitutional response to the extraordinary problems caused by the extreme fractionation of Indian lands.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
ANNE S. ALMY
ROBERT L. KLARQUIST
ANDREW C. MERGEN
Attorneys

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In The

Supreme Court of the United States

October Term, 1995

BRUCE BABBITT, Secretary of the Interior, et al.,
Petitioners,

v.

MARVIN K. YOUPEE, SR., et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENTS

RENE A. MARTELL
Counsel of Record

DANIEL L. MINNIS
D. MICHAEL EAKIN
Montana Legal Services
P.O. Box 409
Poplar, MT 59255
(406) 768-3006

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. 2206, violate the Fifth Amendment because it does not provide for compensation to the estate of the decedent for the land it declares to escheat.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the petition for certiorari, Williamette Y. Brussard and Darlan D. Youpee were parties to the District Court and Court of Appeals actions. Petitioner, Secretary of the Interior, was the defendant/appellant in the courts below. Marvin K. Youpee, Sr., Cary G. Youpee, Allen F. Youpee, and Helen Youpee-Ricker were plaintiffs/appellees in the courts below.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or be deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner's Statement presents an adequate history of the Indian Land Consolidation Act (ILCA) up through this Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987). Pet. Brief at 3-10.

The decedent, William Youpee, died testate on October 19, 1990. He was assisted in drafting his will by the Realty Officer of the Bureau of Indian Affairs area office in Billings, Montana. (Affidavit to accompany Indian Wills, District Court, Administrative Record, Docket No. 13.) He was an enrolled member of the Fort Peck Tribes and owned undivided fractional interests in allotted trust land on Fort Peck, Standing Rock and Devil's Lake Sioux Reservations. Youpee intended to leave his interests to his children, the natural objects of his affections. He did so in a manner that did not cause further fractionalization of his interests in these lands. Despite his efforts to provide for his children, thirty-four parcels of the land and mineral interests that he devised escheated under amended Section 207.

The devisees of these interests filed suit on February 3, 1993, in the district court alleging that the ILCA, as amended, violates the Takings Clause of the Fifth

Amendment to the United States Constitution. C.A. Excerpts of Record (E.R.) 3-4. These plaintiffs also argued that the Department of the Interior, as trustee for the decedent, had failed to advise him that his land as devised would escheat to tribes. E.R. 5. The court held that the ILCA as amended violates the Just Compensation Clause for those property owners who are not legally capable of devising property or who do not have an heir who possesses an undivided interest in the escheatable property. Pet. App. 23a.

The court of appeals affirmed, holding that amended ILCA restricts devise and descent of land by Indian landowners who do not have an heir who owns a share in the parcel and that the statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners. In addition, the court held that amended Section 207 is an extraordinary and impermissible regulation of Indian lands and effects an unconstitutional taking without just compensation.

SUMMARY OF ARGUMENT

This Court found the Indian Land Consolidation Act unconstitutional in *Hodel*. The Act was amended prior to the decision in *Hodel*, but the constitutionality of the amended Act was not an issue before the *Hodel* Court and the Court left that question unanswered. *Hodel* at n.1. Despite the amendments to the act, constitutional problems remain.

The amended Act still fails to provide compensation for the interests taken. The Secretary suggests that

amended Section 207 solves the problem because the takings are *de minimis*. In *Hodel* this court found the takings of lesser valued interests not to be *de minimis*. The problem remains.

The amendments also permit an Indian who owns an escheatable interest to pass that interest to an heir who already owns an interest in the same allotment. This does not solve the takings problem because it denies the Indian the ability to leave land to his lineal descendants.

The amendments to the Act do not change the ability of incompetent Indians or those under the age of 18 to prevent the escheat. There is the same taking from this class as presented in *Hodel*.

In addition, amended Section 207, as written and as implemented, violates the Due Process Clause of the Fifth Amendment. As in the original Act, the 1984 amendments take immediate effect upon enactment. Indian landowners are not provided notice of the escheat, nor are they given a grace period within which to act to avoid the escheat. Due process requires such notice because of the pervasive control over Indian wills and estates.

ARGUMENT

Fractionated land interests are a serious problem. Although the solution to such a problem may require a dramatic action to encourage consolidation, *Hodel*, 481 U.S. at 712, that remedy must remain within the bounds of the Constitution. This Court in *Hodel* decided that Section 207 of the ILCA violates the Takings Clause of the

Fifth Amendment. This court need only consider whether the amendments cure the constitutional problems noted by this Court in *Hodel*. If those problems remain, the Act, even as amended, remains unconstitutional.

I. THE PROBLEMS NOTED IN *HODEL* ARE NOT CURED.

A. The value of the land taken is not *de minimis*.

The value of ILCA escheated land is not *de minimis*. In *Hodel* this Court considered the value of the land, not the income generated from the land, when it determined that the taking of 2% parcels was not *de minimis*. 481 U.S. at 714. The amendments, passed before this Court's *Hodel* decision, still focused on the income generated from the property rather than on the value of the property itself. Had Congress had the benefit of this Court's decision it could have addressed the problems that this Court would find. As the law now stands, the same constitutional problem persists.

The Secretary makes the same *de minimis* argument this Court rejected in *Hodel*, again arguing the *de minimis* value of income generated rather then the value of the property taken. The value of Youpee's escheated land is approximately $2,100.00, an amount greater than the escheated portions of two of the three estates considered in *Hodel*. Two thousand dollars is not a trivial sum. Such a sum has an even greater significance in a Montana county

which ranked fifty-sixth of fifty-six in per capita income in the year of the taking.[1]

The focus on the income generated does not reflect the true value of the taking. Some of the escheated interests in this case were mineral interests. Unexploited mineral interests can be valuable yet generate no income until the minerals are extracted. Many Indian lands have valuable timber.[2] Timber can be harvested about once each generation. The value of harvestable timber is not reflected when considering only income generated in the last five years. While expanding the time within which land could earn a set amount solves a portion of the problem, it does not eliminate the takings of valuable interests.

Even if this Court decides that the value of the land is *de minimis*, *de minimis* takings are takings nonetheless. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982). The takings problem can be solved by paying the *de minimis* value for the *de minimis* taking.

B. *Inter vivos* transfers do not cure the taking.

This Court has already decided that the possibility of "complex *inter vivos* transactions" do not cure the takings problem. *Hodel*, 481 U.S. at 716. Rather than accept the

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[1] Regional Economic Information System, Bureau of Economic Analysis, U.S. Dept. of Commerce, released June 4, 1996.

[2] The Ft. Peck Allotment Act, 30 Stat. 558, provides that each allottee will receive not less than 2.5 acres nor more than 20 acres of timber land.

Hodel decision, the Secretary chooses to argue about the adjective "complex," arguing that "simple" *inter vivos* transfers can prevent a taking. (See Pet. Brief at pp. 28-34). Such transfers are complex because they are difficult to understand. The average landowner knows what a will is but does not know what an *inter vivos* trust is. The Secretary is mandated to assist in the preparations of Indian wills. 43 C.F.R. § 4.260 (1995). There is no mandate that the Secretary assist in the preparation of *inter vivos* transactions. Whether such transfers are "complex" or "simple" does not matter. This Court has already decided that such transactions are "not an adequate substitute for the rights taken." *Hodel* at 716.

The Secretary acknowledges that all transfers of trust land must be approved by the Secretary. (See Pet. Brief at p. 28 n.12). Such action by the Secretary is discretionary. 25 C.F.R. § 152.17 (1995). Approval of *inter vivos* transfers could require the Secretary to exercise his discretion in a manner contrary to the expressed Congressional policy of encouraging land consolidation. It would also require the Secretary to act contrary to the interest of the tribes for whom he serves as trustee. The suggestion that the Secretary would readily approve such transactions is speculative at best.

The suggestion of transfer by revocable trust is impractical. Already the United States serves as trustee for the lands held in trust. The establishment of an *inter vivos* trust creates a trust within a trust. It is doubtful that a beneficiary of a trust can place the corpus of the trust in yet another trust.

Even if there are methods to transfer land during a person's lifetime, if the land is taken upon the person's death, there is still a taking. The Fifth Amendment requires compensation for that taking.

C. The amended Act does not permit the landowner to leave his land to an heir.

As noted in *Hodel*, the right to leave property to heirs is a time honored tradition. " . . . In one form or another, the right to pass on property – to one's family in particular – has been a part of the Anglo-American legal system since feudal times." 481 U.S. at 716. The Court found a property interest in one's right to devise, at least in part, because of this tradition. The amended Act continues to prevent the testator from leaving property to his heirs, as did the original Act. As the Ninth Circuit noted, "the amended ILCA continues to completely abrogate both the descent and devise of land to an heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest." *Youpee v. Babbitt*, 67 F.3d 194, 199 (9th Cir. 1995). This Court has recognized certain liberty interests in family relations that are protected by the Due Process Clause of the Fifth Amendment. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). One such protected family interest is the right to provide for one's children by devise or descent. While not expressing the right in these terms, the Court in *Hodel* noted that the abrogation of the right "goes too far." The ILCA which abolishes descent entirely and generally

limits devise to collateral relatives violates this liberty interest.

The Secretary argues that the sovereign has a right to regulate or even abolish descent and distribution, citing *Jefferson v. Fink*, 247 U.S. 288 (1918), *Irving Trust Co. v. Day*, 314 U.S. 556 (1942), and the Uniform Probate Code. (Pet. Brief at p. 37). The argument is unpersuasive.

The issue in *Jefferson* was choice of law. The dispute arose when an allottee died in 1908 without spouse or issue, but with collateral heirs. Congress had statutorily changed the intestacy law of the Indian Territory from incorporating the law of Arkansas to incorporating the law of Oklahoma. There was no taking in *Jefferson*; the property still went to his heirs. Thus, *Jefferson* does not advance the Secretary's theory that the sovereign's right to determine descent and devise is bound only by the extent of Congress' plenary power.

Irving Trust implies that the Constitution does not prohibit the abolition of the power to devise. However, the facts arose in the context of a wife taking an elective share after signing a prenuptial agreement. The issue decided was an impairment of contract issue, not a Takings Clause issue. While *Irving Trust* does discuss the state's power in regulating devise, it did not address whether a state could abolish devise and descent. In *Irving Trust*, the state had only limited devise by requiring certain formalities for a prenuptial contract waiving a spouse's elective share. The Court upheld the procedural requirements of a state statute that mandated protection of the family.

The Secretary also cites *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898); *United States v. Perkins*, 163 U.S. 625, 628 (1896); *Mager v. Grim*, 49 U.S. (8 How.) 490, 493 (1850); *United States v. Fox*, 94 U.S. 315, 320 (1876); *Randall v. Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874). These decisions amount to constitutional regulation of one's right to descent and distribution because they seek to limit not eliminate that right. Specifically *Mager*, *Magoun* and *Perkins* investigate the constitutionality of inheritance taxes; *Randall* involves divestiture of a property right wrongly obtained and *Fox* divests property wrongfully bequeathed by a corporation instead of a natural person. Each case holds that the right to take property by descent or devise is a privilege not a right and as a result is subject to conditions. *See e.g., Magoun*, 170 U.S. at 288. The legitimacy of the argument advanced by these cases notwithstanding, this Court in *Hodel* has decided that when the character of these conditions becomes extraordinary, an unconstitutional taking results. The cases the government cites involve factual patterns in which the character of the taking is not extraordinary; that is, there is no elimination or even severe limitation of a property right. The amended Act in this case is different, the right of descent is eliminated and the right to devise is either severely curtailed or eliminated altogether.

The Uniform Probate Code and other forced heir statutes require some property (usually a portion of the estate) descend to a decedent's immediate family. It is done for the protection of the family. The case at bar differs. Here the statute does not attempt to require that certain property or amounts of property be left to the

family. Instead it seeks to force an escheat of land. To force a decedent to provide for his family merely seeks to regulate the process in a manner that could be considered constitutional. The amended Act, on the other hand, seeks to force an escheat because it limits heirs except for a few collateral heirs who might be difficult if not impossible to locate.

In addition, when the amended statute forces an escheat, it does so with the decedent's real property. The forced heir statutes, on the other hand, can be satisfied with a testamentary distribution of personal property. This Court indicates that an owner's expectations concerning the nature of his interests may be dependent upon the category of that property. Therefore, land and rights that are taken pursuant to Government regulation may warrant different treatment depending upon whether the property to be regulated is real or personal. Real property should be afforded more protection because an owner would reasonably expect it. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024-1025 (1992). The decedent's interest to his land requires more protection from divestiture than title to his personal property.

While the forced escheat provisions of the Uniform Probate Code appear to pass Fifth Amendment muster, the ILCA cannot be seen in the same light. An escheat pursuant to the intestate provisions of the Uniform Probate Code occurs after no lineal and collateral heirs are found. Such an investigation is irrelevant under the ILCA. Escheat occurs whether or not lineal or collateral heirs are found. The forced escheat of the Uniform Probate Code represent a legitimate regulation of the process

because it encourages finding an heir. The ILCA fails to meet this test because it discourages or renders impossible finding an heir.

D. The Act continues to completely abrogate the right to descent for a class of Indians.

The amendments affect only those who are over eighteen years old and competent. If a decedent does not fall into this category, the amended Act is no different than the original Act. Such decedent is still precluded entirely from passing 2% land. 25 U.S.C. 373. Descent is barred even if the descent would consolidate landholdings or at the very minimum, would not further fractionate the tract. The amended Act remains unconstitutional.[3]

II. THE AMENDED ACT TAKES INDIVIDUAL PROPERTY INTERESTS WITHOUT PROVIDING JUST COMPENSATION.

The escheat provision of the amended Act results in an actual physical taking of the real property. This is not a mere regulatory taking in which the owner remains in possession but has limited use of his property. However,

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[3] The Government has contested Youpee's standing to assert the claims of incompetent Indians and those under the age of 18. This Court has already determined in *Hodel* that those in the Youpee's position have standing to assert their decedent's claim. The Court should find standing for Youpee to assert the claims of these other groups pursuant to the prudential concerns outlined by the Court in *Craig v. Boren*, 429 U.S. 190, *reh. den.*, 429 U.S. 1124 (1976).

even if a regulatory analysis were considered, the amended Act still results in an unconstitutional taking.

The Court in *Lucas* lays out the current status of regulatory takings jurisprudence. It identifies the categorical takings and the inquiries to determine regulatory takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1013 (1992).

A per se regulatory taking occurs when the regulation compels the property owner to suffer a physical invasion.[4] *Id.* The second occurs when the regulation denies all economically beneficial use of the land.[5] *Id.* When neither of these categorical treatments apply, then the law of *Pennsylvania Coal v. Mahon* applies; that is, " . . . that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). Over the years the Court has developed a factual inquiry to employ to determine how far is "too far". That test is found in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, (1979).

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[4] *Loretto v. Teleprompter Manhattan CATV Corp., supra; United States v. Causby*, 328 U.S. 256 (1946).

[5] *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

A. The effects of the amended Act amount to a categorical taking.

Amended Section 207 amounts to a permanent invasion of Youpee's property rights. This case can be analogized to *United States v. Causby*, 328 U.S. 256 (1946). In *Causby*, a property owner operated a chicken farm on land adjacent to an airport which became a frequent landing spot for United States airplanes. Noise from the airplanes rendered the property valueless as a chicken farm because the noise caused the chickens to fly into the walls of the coop and kill themselves. The Court held that the owner's property interest extended to the "immediate reaches" of air space above his property, and when the Government physically invades that space and that invasion renders the land useless, the loss is complete and a taking results. *Causby*, 328 U.S. at 265. The Court found that the physical invasion of one property right ("immediate reaches") which rendered another property right (use of surface) valueless was sufficient to find a categorical taking.

In this case, the Government invades one property right (right to descent and right to devise) which renders another property right (right to know that the heirs will have use and enjoyment of the escheated parcel) valueless. Therefore, this Court should find that the amended Act amounts to a per se taking.

Andrus v. Allard, 444 U.S. 51 (1979) offers no solace to the Secretary. *Allard* indicates that regulating a property owner out of one right attached to that property may not amount to a physical invasion. In that case, the Court decided whether the regulation of an Indian owner's

right to transfer eagle feathers by prohibiting their sale was a taking. The Court decided that there was no taking because the Indian owner retained possession and the right to transfer the ceremonial feathers by methods other than sale. Crucial to the Court's reasoning was the owner's retention of the " . . . right to possess, transport, . . . and to donate or *devise* . . . " the feathers. *Id.* at 66 [emphasis added]. Because he retained those rights, his possession and that of his heirs was assured.

The amended Act denies the right to transfer by devise to a large class of persons and by descent to all. Thus, reliance on *Allard* is misplaced because *Allard* did not result in loss of property. Unlike *Allard,* there is a taking of property under the amended Act.

B. Loss of the right to descent and restriction on the right to devise goes too far and results in a taking without compensation.

Even if the Court finds that there was no physical invasion, the effects of the amended Act should amount to a taking because the regulation "goes too far". *Penn Central Transportation Company v. New York City, supra.* No set formula exists to determine in all cases whether compensation is constitutionally due for a Government restriction of property. *Id.* Ordinarily the Court must engage in ad hoc inquiries. *Id.* This Court has looked to the character of the Government taking, *Hodel,* and the

degree of interference in investment backed expectations. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).[6]

The Court should consider two aspects of the character of the taking. The average reciprocity of advantage is the first aspect. In this case, there is no reciprocity of advantage. William Youpee was, and his children are, enrolled on the Fort Peck Reservation in Montana. Many of the escheated parcels are on the Standing Rock and Devil's Lake Reservations in North and South Dakota. Youpee's heirs will not share in the advantage of those Tribes having an increased land base. There is no reciprocity of advantage when the land and minerals escheat to a foreign reservation.

In *Hodel* this Court weighed the reciprocity of benefits and concluded that they weighed weakly in favor of the statute's constitutionality. Despite that result, the Court decided that elimination of the right to descent and devise made the character of the act "extraordinary" thus resulting in a taking. This reasoning most closely resembles the categorical approach taken in *Lucas.* When the character of the taking is such that a property right is eliminated, a taking results even if benefits and burdens weigh in favor of the statute.

The character of the Government act remains "extraordinary" as it did in *Hodel.* It remains so because a

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[6] Youpee defers to the decision in *Hodel* that the decedent's investment backed expectations " . . . is dubious." *Hodel,* 481 U.S. at 715. Youpee will note, however, that at one point the mineral estates were reserved on several parcels when the surface was conveyed. The minerals were viewed as an investment.

property right is eliminated. The right to devise has been severely curtailed to the point of *de facto* elimination, and the right to descent has been eliminated altogether. In addition, for the class of Indians under 18 years of age and incompetents, the character of the taking is the same as in *Hodel;* that is, the right to descent is eliminated. Thus, the character of the taking for most differs little from what it was in *Hodel* and for those 18 or under or incompetent it remains the same.

The Secretary argues the fact that the amended Act continues to promote the common good to those who also must bear its costs cuts in favor of its constitutionality. (Pet. Brief at p. 27). But the fact that the Government is acting to promote the common good for all does not establish or even strongly suggest that no taking has occurred. Although the Government must be acting to promote the common good to meet the public use test, a compensable taking plainly can occur even if the public use test is satisfied. For example, when the Government formally exercises its eminent domain power to take one's land for a public park, the Government is acting to promote the common good. Similarly, the Government was acting to promote the common good when it sought to acquire a public beach access easement in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), when it sought to save public money in *Lynch v. United States,* 292 U.S. 571 (1934) and when it sought to provide public disclosure of health and safety data regarding pesticides in *Ruckleshaus v. Monsanto,* 467 U.S. 986 (1984). Yet in each case the Court found a taking. One cannot distinguish a compensable taking from a noncompensable regulation of property simply by asking whether the Government was

acting to promote the common good. A. Peterson, *The Takings Clause: In Search of Underlying Principles, Part I – A Critique of Current Takings Clause Doctrine,* 77 Cal. L. Rev. 1299, 1357-58 (Dec. 1989).

The question in this case is whether Congress' desire to promote the common good by correcting the bad results of the allotment process should be borne by all taxpayers or whether it can instead be imposed entirely on the owners of these fractionated shares. If there was sufficient average reciprocity of advantage to these allottees, then the amended Act may lean to constitutionality.

The average reciprocity of advantage remains weak. In the unpublished district court opinion that begot *Hodel,* Chief Judge Bogue remarked on the taking as follows:

> The argument that this result will benefit the Indian population as a whole is simply not valid in this Court's experience. The benefits derived form these lands do not filter down to the vast majority of the Indian people on the Pine Ridge Indian Reservation. In this respect, the system is not functioning as contemplated. Congress would be well-advised to examine closely the practical effect of legislation such as 25 U.S.C. 2206.

Irving v. Watt, No. 83-5139 (D.S.D. Sept. 15, 1983), 11 Ind. Law Rep. 3009, 3010 at n.2.

The same observation applies on the Fort Peck Reservation. For the Tribes to accrue a greater land base in this impoverished area is of no direct personal benefit to individual Indians. Roosevelt County, which comprises the majority of the Fort Peck Reservation is among the

poorest counties in Montana. (Regional Economic Information System, Bureau of Economic Analysis, U.S. Dept. of Commerce, released June 4, 1996, citing for the period of 1989-94.)

Fractionated tracts do not contribute to the poverty situation on the Fort Peck Reservation. Seventy-seven per cent of the tracts on Fort Peck are not severely fractionated. (Pet. Brief at 18 n.9). While increasing the tribal interests in fractionated lands may benefit the Tribes, it does not benefit the individual tribal member. The conveyance of the assets to their government is not going to trickle down as an economic benefit to the vast majority of the Indian people on the Fort Peck Reservation. Just because land is held in communal ownership "does not mean that each member had such an interest, as a tenant in common, that he could claim a *pro rata* proportion of the proceeds. . . . " *The Cherokee Trust Funds*, 117 U.S. 288 at 308 (1886).

III. YOUPEE'S RIGHT TO THE DESCENT OF HIS ALLOTMENT IS VESTED.

Even if the right of devise and descent can be limited in the abstract, the right cannot be taken without compensation if it was specifically provided for in negotiated agreements. Youpee's right to descent is contractually vested. Contractual vestment occurred when the language of treaties or allotment acts expressly gave an allottee the right of descent in consideration for his interest in communal land. Contractual vestment occurred implicitly as one stick of the bundle of sticks conveyed

with the individual allotment. A contractual right of descent cannot be altered without giving compensation.

A. Standing Rock and Devil's Lake specific allotment acts expressly provide for the right of descent.

Youpee owned an undivided interest in 14 parcels subject to escheat located on the Standing Rock Reservation valued at $1,239.34. He also owned 5 parcels subject to escheat located on the Devil's Lake Reservation valued at $178.65. The creation of those Reservations guaranteed the right of descent.

By treaty in 1867, some members of the Sisseton, Wahpeton and Cut-Head bands of Sioux were placed on a reservation at Devil's Lake at Fort Totten, Dakota Territory. In the creation of this reservation, it was agreed that land would be allotted in 80-acre parcels with descent to the allottee's heirs. Specifically, the treaty provided, " . . . said lands and the improvements thereon shall descend to the proper heirs of the persons obtaining a patent." Treaty with the Sioux-Sisseton and Wahpeton Bands, 1867, Art. 5, 18 Stat. 505 (1867).

The Standing Rock Reservation was formed pursuant to the Act of March 2, 1889, 25 Stat. 888. That Act divided the Great Sioux Reservation into several smaller reservations. One of them was the Standing Rock Reservation in the Dakota Territory. *Id.* at §§ 3 & 4. All Indians on the Great Sioux Reservation, in consideration for receiving their individual allotments, relinquished title to land on any reservation other than the one assigned to their band. *Id.* at § 16. The agreement also promised allottees the

right to descent according to the laws in force in the State or Territory in which the lands were situated. *Id.* at § 11.[7]

The contract language in these allotment acts is specific. Allottees had to relinquish their rights to the tribal land and to land they held on other reservations. In return, allottees received their Standing Rock and Devil's Lake allotments with the right to descent. The contractual right to descent cannot be abrogated without compensation.

B. The Fort Peck allotments are contractually based.

Fifteen of the thirty-four escheated parcels lay within the boundaries of the Fort Peck Indian Reservation. The Fort Peck Allotment Act does not specifically speak to negotiated exchanges of land for allotments, Act of May 30, 1908, 35 Stat. 558, but the Act's Senate and House Reports do. H.R. 1507, 60th Congress, 1st Session, Vol. 2 Misc. 1907-1908; S.R. 202, 60th Congress 1st Session.[8] That

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[7] The Act reads: "That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered . . . "

[8] The Senate Report reads: " . . . After several days' counsel with the Indians about 95 per cent of the adult members of the tribe agreed on a plan for the allotment of the land and sale of excess lands under the supervision of the Government."

The House Report reads: " . . . After several days' council (sic) with the Indians about 95 per cent of the adult members of the tribe entered into a written contract agreeing on a plan for the allotment of the lands and the sale of the excess lands under the supervision of the Government."

Act allots the tribal land in accordance with the allotment laws of the United States. The General Allotment Act provides for descent in accordance with the laws of the state or territory in which the allotment is situated. 25 U.S.C. 348. Because the Senate and House Reports provide evidence that contracts were struck between the Tribes and the Government, the Court should conclude that the allotments and the property rights that accompanied them were contractually guaranteed.

Even for those reservations where there is no specific contract for allotments, the right of descent is present since allotment acts are to be read in *pari materia*. *United States v. Jackson*, 280 U.S.183, 196 (1930); *CIR v. Stevens*, 452 F.2d 741 (1971). Individual Indian lands held in trust by the United States should receive like legal treatment regardless of statutory origin. Felix Cohen, *Handbook of Federal Indian Law* 618 (1982). Since there is express language guaranteeing the right of descent in some specific allotment acts,[9] the right attaches to all Indian land.

The individual Indians who negotiated with the government for allotments contracted for more than mere life estates. Part of the bundle of sticks for which they negotiated was that they and their heirs would own the land in perpetuity. In interpreting the various allotment acts, the Court should also be guided by that "eminently sound

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[9] See Act of May 1, 1888, 25 Stat. 113; *Choate v. Trapp*, 224 U.S. 664, 667 (1911) (description of Atoka Agreement); *Moore v. Carter Oil Co.*, 43 F.2d 322 (10th Cir 1930), *cert. den.*, 281 U.S. 903, Agreement with Seminole Nation, 30 Stat. 567; *United States v. Ft. Smith & W.R. Co.*, 195 F. 211 (8th Cir. 1912); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

and vital canon" that treaties and statutes dealing with Indians "are to be liberally construed and all doubts resolved in their favor." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 at 655, n.2 (1976). To construe the various allotment acts and treaties as allowing land to escheat violates this canon.

C. Rights in allotments are vested.

Undoubtedly, Congress can abrogate the various treaties with the tribes. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But there is a limit to this power. Congress cannot rely on that power to take vested rights. In the case of allotments, the rights in the property vested when the allotment was assigned to an individual Indian. At that point Congress could not "take away property already acquired under operation of the [contract] or to deprive [the entity] of the fruits actually reduced to possession of contracts lawfully made." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 at 55 (1986), quoting, *Sinking Fund Cases*, 99 U.S. (9 Otto) 700, 720 (1896).

If the United States expressly provides for something in a contract, a taking will occur if the Government reneges on that commitment. In *Monsanto* for example, the Court found a taking when the Government violated its "explicit guarantee" on nondisclosure. *Ruckelshaus v. Monsanto, supra*. In *Lynch v. United States, supra*, the Court held that a taking occurred when Congress enacted a law repudiating disability and life insurance contracts that the Government had issued to veterans under the War Risk Insurance Act. The Court stated that the policy

holders had acquired "vested rights" not mere gratuities that could be redistributed or withdrawn at any time in the discretion of Congress.

Subsequent to *Lynch* the Court explained that it was wrong of the Government to seek to renege on its commitment solely to save money. *See, e.g., Bowen*, 477 U.S. at 55, (citing *Lynch* for the proposition that Congress may not repudiate its own debts, which constitute property to the lender, simply in order to save money); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1977) (citing *Lynch* for the proposition that the "need for money is no excuse for repudiating contractual obligations"). A. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 Calif. L. Rev. at 1349.

Although a bit more distant in time, this Court has applied the same principles to Indian allotments. The allotment of land pursuant to statute operates to vest an allottee with the land and the property rights associated with the land, and Congress cannot abrogate that right without triggering the Fifth Amendment. *English v. Richardson*, 224 U.S. 680 (1912); *Carpenter v. Shaw*, 280 U.S. 363 (1929); *Choate v. Trapp*, 224 U.S. 665 (1912); *Ward v. Love County*, 253 U.S. 17, 21 (1920); *United States v. Chase*, 245 U.S. 89 (1917); *see also*, Felix Cohen, *Handbook of Federal Indian Law* 606 (1982). The allotment acts are such statutes. The conclusion is clear. Property rights acquired by statute vest.

Choate is the most analogous. There the Government had negotiated an agreement in which lands held by the Indians would be non-taxable for a period of twenty-five years. Congress subsequently removed the restriction

prior to the expiration of the statutory period. This court found a taking, noting:

> . . . for although the Atoka Agreement is in the form of a contract, it is still an integral part of the Curtis Act, and if not a treaty, is a public law and as such was amendable and repealable at the will of Congress. But there is broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. (citation omitted). The question in this case is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had acquired rights under the Curtis Act which are now protected by the United States . . .

Choate, 224 U.S. at 568.

In *Choate* this Court found that the individual allotees had acquired such rights. Here, Youpee acquired rights to have his property descend to his children.

The right of descent was included in the purpose of the allotment acts and was part of the bundle of sticks. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into the society at large." *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 at 254 (1992). If Congress wanted Indians to adopt "American ways" by enactment of allotment acts, then it must have intended to transfer traditional property rights when it allotted land pursuant to the allotment acts. Thus, to the extent this Court in *Hodel* defined traditional property rights to include the right to devise and the right of descent, then

one of the property rights granted to Indians by the allotment acts is the right of descent, and it should be respected to the same extent as other traditional property rights.

Youpee recognizes that not all statutory entitlements are vested rights. *E.g., Bowen, supra.* However, the Government has the power to enter into contracts that confer vested rights and with it the duty to honor those rights. *Id.*; *Perry v. United States*, 294 U.S. 330, 350-354 (1935); *Lynch v. United States*, 292 U.S. 571 (1934); *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923).

In the area of Indian allotments, Congress can reallocate future interests in Indian land without causing a taking. *Gritts v. Fisher*, 224 U.S. 640 (1912); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jim*, 409 U.S. 80, *reh. den.*, 409 U.S. 1118 (1972). However, these cases all dealt with situations in which the property interest had yet to vest. Once the land is vested in the allottee, rights to the land cannot be taken without compensation. *Choate, supra; Carpenter v. Shaw, supra.*

IV. AMENDED SECTION 207 VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Youpee was assisted in drafting his will by the Realty Officer in the BIA area office in 1981, prior to the ILCA. The will required the approval of and was retained by the BIA. (C.A. E.R. p. 10). After the passage of both the ILCA in 1983 and the amendments to the ILCA in 1984, the BIA never notified Youpee that his will was no longer valid as to his devise of 34 parcels. (C.A. E.R. pg. 5). The BIA

violated its fiduciary duty to Youpee when it failed to notify him of the deficiencies in his will because of the impact of the ILCA.

The concept of a federal trust responsibility to Indians has evolved judicially to become one of the primary cornerstones of Indian law. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama*, 118 U.S. 375 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Creek Nation*, 295 U.S. 103 (1935). The federal trust responsibility applies to individual Indians as well as the tribal entity. *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866).

While the trust responsibility does not attach to every action taken by the Government, *United States v. Mitchell*, 445 U.S. 535 (1980), it does attach when the Government acts so as to completely fill the field. *United States v. Mitchell*, 463 U.S. 206 (1983). The Government action in the field of Indian wills and estates is pervasive. It drafts the wills, retains possession of the wills, approves the wills and probates the estates. Thus, the Government had a responsibility to Youpee to notify him of the effects of the ILCA.

The responsibility to notify Youpee rises to a constitutional level when Government action can cause a property owner to lose his property. *Lambert v. California*, 355 U.S. 225 at 228 (1957); *see also, Texaco, Inc. v. Short*, 454 U.S. 516 (1982) (Brennan dissenting). Youpee was constitutionally entitled to notice that his land would escheat and what actions he could take to avoid the escheat.

While elimination of these fractionated parcels is the goal of the ILCA, the BIA has allowed this result to be

achieved by violating its trust responsibility to allottees and its constitutional duty to provide notice of the potential escheat.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RENE A. MARTELL
Counsel of Record

DANIEL L. MINNIS
D. MICHAEL EAKIN
Montana Legal Services
P.O. Box 409
Poplar, MT 59255
(406) 768-3006

Attorneys for Respondents

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(8)

No. 95-1595

In the Supreme Court of the United States

OCTOBER TERM, 1996

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

MARVIN K. YOUPEE, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. In *Hodel* v. *Irving*, 481 U.S. 704 (1987), this Court applied the tripartite analysis of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), to determine whether the original version of Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206 (1982), was a regulatory action that went "too far," and therefore violated the Just Compensation Clause of the Fifth Amendment. In our opening brief, we therefore applied the same analysis in arguing that the amended version of the same Act is constitutional under the Just Compensation Clause. Respondents nonetheless argue (Br. 11-14) that the *Penn Central* analysis is inapposite because, in their

view, what is at issue here is not a "regulatory taking." Respondents argue instead that the Court should strike down Section 207 as a permanent, physical invasion of private property rights.

Respondents' approach is obviously inconsistent with this Court's decision in *Hodel* v. *Irving*. The Court there applied the *Penn Central* analysis because that is "[t]he framework for examining the question whether a regulation of property amounts to a taking requiring just compensation." 481 U.S. at 713. The unamended Section 207 was a regulation of property, because it is the decedent's rights that are at issue in a case such as this, see 481 U.S. at 711-712, and because Section 207 did not grant the United States (or the Tribe to which the property may escheat) any authority physically to invade or otherwise control the use or enjoyment of the property interests at issue while they were in the decedent's hands. Rather, Section 207 merely eliminated the decedent's ability to dispose of his or her property in one particular manner (by devise or descent), which comes into play only at one particular time (at the time of death). All other rights to dispose of the property before or at death, and all rights to use and enjoy the property during the decedent's lifetime, remained entirely unaffected by Section 207. Therefore, the unamended Section 207 was just the sort of regulatory measure that has long been examined through the lens of the tripartite *Penn Central* framework.[1] The amended Section 207 has still less of

[1] See, *e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004-1005 (1984); *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981); *Agins* v. *Tiburon*, 447 U.S. 255, 260-261 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-175 (1979).

an effect on the decedent's property, because it does not entirely eliminate devise, but merely limits the class of eligible devisees. The *Penn Central* analysis therefore should be applied in this case as well.

That conclusion also follows from this Court's decision in *Andrus* v. *Allard*, 444 U.S. 51 (1979). In that case, the Court employed the *Penn Central* regulatory-taking analysis to determine the constitutionality of a statute that forbade owners of certain eagles or eagle parts from selling them. 444 U.S. at 65-68. That statute therefore had a greater effect on the right of alienation (and a greater effect on the economic value of the property) than does Section 207, which leaves the owner of minor fractional interests in property with a variety of means to sell or otherwise dispose of that property both before and at death. See Gov't Br. 27-31. If the *Penn Central* analysis was appropriate in *Allard*, it follows *a fortiori* that it applies here.

Finally, neither of the authorities on which respondents rely to urge a different analysis is apposite. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), involved a statute that prohibited all construction on certain beachfront property and thereby "rendered valueless" the property involved. *Id.* at 1020. The Court found "categorical treatment"—rather than the *Penn Central* analysis—appropriate based on a line of cases supporting such treatment "where regulation denies all economically beneficial or productive use of land." *Id.* at 1015. In this case, by contrast, Section 207 has little impact on the uses to which the decedent's minor fractional interests could

be put, on the market value of those interests, or on the ways in which the decedent could use or enjoy whatever rights those interests gave him in the property at issue. Accordingly, the "categorical approach" of *Lucas* has no application here.

United States v. *Causby*, 328 U.S. 256 (1941), establishes the same point. If that 1941 case had indeed dictated that Section 207 be considered under the analytical framework for physical—not regulatory—takings, the Court's decision 36 years later in *Hodel* v. *Irving*, which analyzed the original version of Section 207 under the regulatory taking framework, would be inexplicable. *Causby* provided no guidance in *Hodel* v. *Irving*—and provides no guidance for this case—because it involved a direct physical invasion of the airspace above a private person's property by low-flying government planes landing at an adjacent airport. See 328 U.S. at 265. *Causby* did not involve an effort to regulate the uses of the property (or the airspace above it) or the ways in which the owner could dispose of property at death or before. The court's determination that a physical taking resulted in *Causby* therefore does not suggest that a physical taking is at issue in this case.

2. Applying the *Penn Central* analysis, we explain in our opening brief (Gov't Br. 24-25) that the economic impact of the amended version of Section 207 is less than the economic impact of the original version, and that that fact supports the constitutionality of Section 207 as it now stands. Respondents do not dispute that conclusion.[2] We also note (Gov't Br. 26) that

[2] Amici Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, *et al.*, argue (Br. 11-13) that Section 207's less-than-$100-in-five-years income test may result in the escheat of valuable interests in lands on which timber is harvested once every ten or more years, lands containing mineral interests on which mining has not yet commenced, etc. Such valuable interests would not, however, be escheated under Section 207. For example, if land is used for a timber harvest every ten years, it could presumably be shown that the land could be leased for a ten-year period—including one timber harvest—at a set annual amount. If that lease amount would result in income of more than $100 per year for a fractional interest in any one of the five years after the decedent's death, the fractional interest would not escheat.

respondents have no greater investment-backed expectations than did the plaintiffs in *Hodel* v. *Irving*. The Court's conclusion in *Hodel* v. *Irving* that that factor supported the constitutionality of the unamended Section 207 therefore is equally applicable here. Respondents accept that conclusion as well. See Resp. Br. 15 n.6.

Respondents do take issue with our analysis of the third *Penn Central* factor—the character of the governmental action. We point out in our opening brief (Gov't Br. 34-39) that this Court has frequently adverted to the broad authority of the sovereign to regulate the laws of inheritance, and that recognition of that broad authority is highly relevant in evaluating the character of the governmental action at issue here. Respondents reply that each of the cases we cite is distinguishable on its facts and that none of them establishes "that the sovereign has a right to * * * abolish descent and distribution." Resp. Br. 8.

Our argument is not that the sovereign has an absolute right generally to abolish *all* descent and devise of private property. *Hodel* v. *Irving* itself would seem to establish that to do so would violate the Constitution if just compensation were not paid to the

owners. But in analyzing the character of the governmental action, it surely is significant that regulation of the descent and devise of property is an area in which the sovereign's authority has always been recognized as very broad. Indeed, the Court in *Hodel* v. *Irving* itself "reaffirm[ed] the continuing vitality of the long line of cases recognizing [the sovereign's] * * * broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. The cases "reaffirm[ed]" by the Court in *Hodel* v. *Irving* are the same as those upon which we rely here. Although they arose in distinct factual settings, the underlying principle on which they rest—that "[t]he right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions on it," *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898)—is not in doubt.

3. Respondents argue (Resp. Br. 18) that, "[e]ven if the right of devise and descent can be limited in the abstract, the right cannot be taken without compensation if it was specifically provided for in negotiated agreements." Respondents argue (Resp. Br. 19) that the interests subject to escheat that are located on the Devil's Lake Reservation were originally patented under a treaty that, in their view, granted the patentee (and his heirs) a vested right of descent. They argue (Resp. Br. 19-20) that the interests subject to escheat that are located on the Standing Rock Reservation were similarly originally patented under an allotment act that similarly granted the patentee a vested right of descent. Finally, they argue (Resp. Br. 20-21) that the interests subject to

escheat that are located on the Fort Peck Reservation, although not allotted under a treaty or statute that specifically granted a right of descent, should be understood to have been subject to the same vested right to descent, derived from congressional committee reports on the Fort Peck Allotment Act, the General Allotment Act, or allotment acts involving other reservations.

Respondents' arguments are mistaken. Initially, nothing in any of the treaties or statutes cited by respondents gave any allottee the right respondents assert on behalf of their decedent in this case—to dispose of property by devise. To the contrary, those treaties and statutes provided that the allotted property would pass by descent at the death of the patentee. It was not until much later, in 1910, that Congress first generally provided for a right of devise. See Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 373; see F. Cohen, *Handbook of Federal Indian Law* 220 (1942). And even the provision for descent of allotted property was stated in terms of what would occur on the death of the allottee; the cited provisions contain no statement regarding the rights of descent for those (like the decedent here) who succeeded to the property at a later date. Compare *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Nation*, 502 U.S. 251, 262-263 (1992) (contrasting effect of General Allotment Act on original allottees with its effect on subsequent Indian owners).

Moreover, the treaties and statutes cited by respondent could only reasonably be understood to provide that the property at issue would descend in accordance with the law of inheritance of the relevant sovereign (in this case, the United States) as in effect

at the time of a particular individual's death. For example, the pertinent portion of the treaty providing for allotment of the Devil's Lake lands provided that each patent "shall not authorize any transfer of said lands * * * except to the United States, but said lands * * * shall descend to the proper heirs of the persons obtaining a patent." Treaty with the Sioux-Sissiton and Warpeton Bands, Feb. 19, 1867, Art. 5, 15 Stat. 506 (1867). In so providing, the treaty does not specify a rule for determining who the "proper heirs" (if any) of the patentee would be, or what laws of descent would govern the disposition of the land at the death of the patentee or subsequent owners. In enacting the amended Section 207, Congress exercised its authority to determine that the "proper heirs" of a minor fractional interest are those who already own an interest in the same property—or, failing such a designation, the Tribe itself. This Court long ago held that Congress has plenary authority over the rules of descent governing Indian lands, and that federal law accordingly governs in this area. See, *e.g.*, *Jefferson* v. *Fink*, 247 U.S. 288 (1918); *Hodel* v. *Irving*, 481 U.S. at 712, 717 (reaffirming *Jefferson* v. *Fink*). Section 207 is thus entirely consistent with the treaty, and it does not operate to extinguish any "vested right" provided by treaty.

The same conclusion applies to the lands on the Standing Rock Reservation. Those lands were allotted pursuant to the Sioux Allotment Act of 1889, ch. 405, 25 Stat. 888. Section 11 of that Act provided "[t]hat the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto." 25 Stat. 891. That Act was not a contract under which Congress conferred on individual allottees (and those to whom the land passed in

future generations) a permanent and vested right to a particular set of inheritance rules.[3] Indeed, the Court rejected just that construction of a similar statute in *Jefferson* v. *Fink*, which involved Indian lands allotted under a statute specifically providing for their descent under the law of Arkansas. This Court held that the statute did not preclude Congress from later providing that the lands would descend in accordance with the law of the newly admitted State of Oklahoma instead. In so holding, the Court explained that "[w]hat was said [in the original allotment statute] was purely legislative, not contractual." 247 U.S. at 294. Therefore, "[l]ike other rules of descent," the rule provided for in the allotment act "was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner." *Ibid.*

4. Respondents argue (Resp. Br. 11 & n.3) that the amendments to Section 207 have no effect on those who are minors or otherwise incompetent, and that Section 207 therefore is unconstitutional as applied to individuals in those groups. The decedent in this case, however, was neither a minor nor incompetent, and the will he executed was given full legal effect. Accordingly, this case does not present the question whether the amended Section 207 would be valid as applied to those who are minors or who are

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[3] See, e.g., *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 465-466 (1985) ("absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise") (internal quotation marks omitted).

incompetent, and there is no basis for the Court to offer an advisory opinion on that subject.

Respondents also argue (Resp. Br. 25-26) that to apply the amended Section 207 in this case would violate the Due Process Clause of the Fifth Amendment, because government officials assisted the decedent in drafting his will in 1981 (before the ILCA was enacted) and did not thereafter notify him that his will was no longer valid as to the parcels that would escheat under the Act. That claim was not passed upon by either court below and is not fairly included in the question presented. Accordingly, this Court should not address it in the first instance.

5. Amici Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, *et al.*, point out (Br. 23-25) that *inter vivos* disposition of minor fractional interests requires the permission of the Secretary of the Interior. In their view, such permission would be unlikely to be granted. They argue that, because in their new *inter vivos* transfers are likely to be impossible, Section 207's restrictions on devise and descent of minor fractional interests represent a particularly serious intrusion on the value of those interests. Amici's premise—that the Secretary does not or would not approve gifts (perhaps with reservation of a life estate) or other *inter vivos* transfers of minor fractional interests—is mistaken.

First, amici allege (Amici Br. 23) that the Secretary would not approve *inter vivos* transfers because Section 207 "expresses Congressional disfavor of transactions that fail to consolidate fractionated interests." All parties concerned—including Congress, the Secretary of the Interior, and amici themselves, see Amici Br. 3 (fractionation "has prevented the

effective use of land in divided ownership")—recognize that the extreme fractionation of Indian land interests is a serious problem. Section 207 represents a congressional judgment about one measure to be taken to address that problem. Section 207, however, is not reasonably read as a command to the Secretary of the Interior to do everything conceivable to avoid the problem, including disapproving reasonable *inter vivos* transfers. To the contrary, the Bureau of Indian Affairs has instructed its employees that "[a]n individual might not want his/her trust * * * property to escheat to the tribe" under Section 207; that "[e]scheat is the avenue of last resort, and attempts may be made to avoid escheat through beneficial use of a will or *inter vivos* transfers"; and that "[b]ecause ILCA does not restrict *inter vivos* conveyances, a person can transfer small interests to anyone during his/her lifetime." Department of the Interior, Bureau of Indian Affairs, 54 BIAM Supp. 8, "Estates Planning and Administration Guidelines," Illustration 1, at 32 (July 7, 1992).[4] In any event, even if the Secretary were to conclude that he should not approve an *inter vivos* transfer of a minor interest that would result in increased fractionation, it would not follow that he would disapprove a transfer of such

[4] See also 54 BIAM Supp. 8, Illustration 1, at 28 (instructing BIA employees that "you will be benefitting both the testator and devisees to the extent that you can consolidate interests in property through inter vivos transfers and through the will-drafting process"). We have lodged a copy of the Guidelines with the Clerk of the Court.

an interest to a single recipient in order to enable the owner to realize its full economic value.[5]

Second, amici contend (Br. 24) that the Secretary would disapprove *inter vivos* transfers because "the Secretary has a substantial incentive not to facilitate or approve *inter vivos* transfers which prevent escheat" and thereby increase the administrative burden on the Bureau of Indian Affairs. See also Amici Br. 10. With respect to the lands at issue, however, the Secretary acts as trustee and the individual Indians are the beneficial owners. *Tooahnippah* v. *Hickel*, 397 U.S. 598, 609 (1970). The Secretary as trustee must act in the best interests of the beneficial owners, and he therefore could not disapprove an *inter vivos* transfer in order to save administrative costs for the government. See *id.* at 609 (purpose of requiring Secretarial approval of *inter vivos* dispositions of trust property is "to protect Indians from improvident acts or exploitation by others"). There is no basis for concluding that the Secretary will fail to abide by his trust obligations. Indeed, amici offer no evidence that the Secretary or those acting on his behalf have ever disapproved an *inter vivos* transfer so that the property interest at issue would escheat under Section 207.[6]

6. We argue in our opening brief (Gov't Br. 40-42) that, even if escheat under Section 207 is found to have resulted in a taking of property without just

[5] We are informed that the BIA has, for example, regularly approved deeds transferring title to allotted trust lands but retaining a life estate in the grantor.

[6] Amici properly acknowledge (Br. 24), moreover, that there is no impermissible conflict of interest in the management of trust lands. See *Nevada* v. *United States*, 463 U.S. 110, 128, 142 (1983).

compensation in this case, the Act would remain valid in cases in which the decedent left a will that (unlike the one here) attempted to further fractionate the decedent's minor ownership interests or in cases in which the decedent died intestate. Neither respondents nor their amici take issue with that conclusion. In cases in which operation of the amended Section 207 would simply prevent further fractionation of minor fractional interests, there is no basis for challenging its constitutionality. See *Hodel* v. *Irving*, 481 U.S. at 718 ("Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat."). In cases of intestate succession, it is as reasonable to assume that those who died intestate were relying on (or at least prepared to accept) the authority of Section 207 to pass their minor fractional interests to the Tribe as it is to assume that they intended some other disposition of those interests. Moreover, it is not unreasonable to require a person who wishes to prevent escheat to take the affirmative step of preparing a will that designates a particular devisee for the fractional interest. As applied in cases of intestate succession, then, Section 207 should be recognized as constitutional.

Section 207 has operated as intended for almost 12 years since it was amended and for more than nine years since this Court's decision in *Hodel* v. *Irving*. As we noted in the petition for certiorari (at 16), the Department of the Interior estimated at that time that between 9300 and 14,880 estates involving escheatable interests had been probated under the amended Act in the Ninth Circuit alone. That ongoing administration of Indian estates and lands

should not be disrupted by now declaring the amended Section 207 unconstitutional on its face.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

WALTER DELLINGER
Acting Solicitor General

OCTOBER 1996

(5)

Supreme Court, U.S.
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No. 95-1595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, Secretary of the Interior, *et al.*,

Petitioners,

v.

MARVIN K. YOUPEE, SR., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE OF THE DECISION BELOW

Of Counsel
STEPHEN E. ABRAHAM
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

* JAMES. S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae

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36 pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. § 2206, violated the Fifth Amendment because it did not provide for compensation to the estate of the decedent for the land it declared to escheat.

PARTIES TO THE PROCEEDINGS BELOW

In the courts below, the defendant/appellant was the Secretary of the Interior. The plaintiffs/appellees were Marvin K. Youpee, Sr., Cary G. Youpee, Darlan D. Youpee, Allen F. Youpee, Helen Youpee-Ricker, and Williamette Y. Bussard.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief *amicus curiae* in this matter.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court and other courts representing both *amicus curiae* and property owners. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, Foundation attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and the Foundation itself participated as *amicus curiae* in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994), including the closely related case of *Hodel v. Irving*, 481 U.S. 704 (1987).

PLF seeks to augment the argument in support of the respondents and affirmance of the decision of the Court of Appeals for the Ninth Circuit. PLF believes that its public policy perspective and litigation experience in support of economic rights will provide an additional needed viewpoint with respect to the issues presented by this case.

Because of the extraordinary importance of the issues raised by this case for private property owners nationwide, Pacific Legal Foundation provides this amicus curiae brief in support of the respondents. Consent to the filing of this brief

has been granted by counsel for petitioners and respondents, and has been lodged with the Clerk of this Court.

OPINION BELOW

The September 5, 1995, opinion of the United States Court of Appeals for the Ninth Circuit is reported at 67 F.3d 194 (9th Cir. 1995). The March 3, 1994, opinion of the United States District Court for the District of Montana, Billings Division is reported at 857 F. Supp. 760 (D. Mont. 1994).

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides in relevant part that "no person shall ... be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation."

In 1887, Congress enacted the General Allotment Act, ch. 119, 24 Stat. 388, as a means of dividing the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement. Two years later, Congress adopted a statute[1] which divided the Great Reservation of the Sioux Nation into separate reservations and allotted specific tracts of reservation land to individual Indians. Each head of household took 320 acres of land and most other individuals 160 acres. The allotments were held in trust and, until 1910, the land passed according to the laws of inheritance in the states where the lands were located. After 1910, the allotments could be disposed of, subject only to regulations promulgated by the Secretary of the Interior.

Because the land was held in trust and could not be alienated or partitioned, undivided interests in the allotments

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[1] Act of March 2, 1889, ch. 405, 25 Stat. 888.

were passed to successive generations. In each generation the number of property owners increased geometrically until, after less than 100 years, some parcels had hundreds of owners.

Hearings before Congress led to the realization that the administrative costs in many cases exceeded the income generated by leases of the parcels. 78 Cong. Rec. 11,728 (1934). Despite Congress having ended the practice of creating allotments in 1934, the fractionalization of parcels continued. Finally, Congress passed the Indian Land Consolidation Act of 1983 (ILCA), 25 U.S.C. § 2201, *et seq.*, in an effort to ameliorate the problem.

Section 207 of the Indian Land Consolidation Act, 25 U.S.C. § 2206, provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

96 Stat. 2519.

Because Congress made no provision for the payment of compensation to the owners of the interests covered by Section 207, this Court determined that section of the Indian Land Consolidated Act unconstitutional as authorizing a taking of property without just compensation in violation of the Fifth Amendment. *Hodel v. Irving*, 481 U.S. 704.

While recognizing that the states have "broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause," this Court unequivocally deemed the

right to pass on property to one's heirs itself to be a valuable right. *Hodel*, 481 U.S. at 715, 717. The difference between the ability of a state to limit or even eliminate a method of testamentary devise and this section was that *both* descent and devise were completely abolished. *Hodel*, 481 U.S. at 718.[2]

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[2] Prior to this Court's decision in *Hodel* as well as the decision of the Court of Appeals for the Eighth Circuit, *Irving v. Clark*, 758 F.2d 1260 (1985), Section 207 was amended. That amended version of the section was not properly before this Court and no opinion on the validity of the amended section was expressed. *Hodel*, 481 U.S. at 710 n.1. That amended section is now properly before this Court and provides, in part:

> (a) Descent or distribution
>
> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is

(continued...)

William Youpee, a member of the Sioux and Assiniboine Tribes, died on October 19, 1990, at the age of 75. During his lifetime, he possessed undivided interests in allotted trust land on several Indian reservations. Upon his death, Youpee's estate was assigned to an Administrative Law Judge (ALJ) of the Department of the Interior (DOI) to determine the heirs to and claims against the estate. At the hearing, the ALJ stated that a number of Youpee's interests would escheat to various tribes under the amended ILCA.

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[2] (...continued)

> incapable of earning $100 in any one of the five years following the death of the decedent.
>
> (b) Escheatable fractional interest
>
> Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.
>
> (c) Adoption of Indian tribal code
>
> Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

ILCA § 207, 25 U.S.C. § 2206.

They would escheat to the tribes based on Bureau of Indian Affairs (BIA) certifications that Youpee's interest in specific allotments were 2% or less, and that the designated devisee was not an owner of an existing share of that allotment.

After a rehearing was denied, plaintiffs, heirs of Youpee to whom interests in the allotted trust land would have passed but for the escheat provisions of the ILCA, appealed to the DOI Board of Indian Appeals. The board dismissed the appeal for want of jurisdiction after which an action was filed in United States District Court.

The District Court granted summary judgment in favor of the plaintiffs. It held, just as this Court had in *Hodel v. Irving*, that plaintiffs had standing to assert their claims and declared that Section 207 of the ILCA, as amended, violated the Takings Clause of the Fifth Amendment. *Youpee v. Babbitt*, 857 F. Supp. 760, 766 (D. Mont. 1994).

The government timely appealed to the Court of Appeals for the Ninth Circuit which affirmed the decision of the District Court. In its opinion, the court observed:

> Instead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group. The amended ILCA continues to completely abrogate both the descent and devise of land to an heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest. Thus, under ILCA, many decedents will be unable to transfer land to their heirs, which Hodel recognizes is "itself a valuable right."

> The amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel. The amended statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners.

Youpee v. Babbitt, 67 F.3d 194, 199-200 (9th Cir. 1995).

In *Hodel*, this Court held that the regulation was extraordinary, amounting "to virtually the abrogation of the right to pass on a certain type of property--the small undivided interest--to one's heirs." *Hodel*, 481 U.S. at 716.

The question raised in this case is whether Section 207 of the ILCA, as amended, which still severely limits the number of individuals to whom property may be transferred, and, for all practical purposes, eliminates both descent and devise to lineal heirs, destroys an essential valuable property right. The issue at the core of this case is whether small parcels of property are no less deserving than large parcels of the protections afforded by the Fifth Amendment to the United States Constitution.

For the reasons stated below, amicus Pacific Legal Foundation supports respondents' request that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit on September 5, 1995, wherein that court ruled Section 207 to be in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

In 1987, this Court held Section 207 to be unconstitutional, depriving the property owners of an essential element of property ownership, one "part of the Anglo-American legal system since feudal times." *Hodel v. Irving*, 481 U.S. at 716. In the words of Justice Holmes, the regulation "[went] too far." *Id.* at 718 (citing *Pennsylvania*

Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). By the time the case was heard, the section had been amended, but that amendment was not properly before this Court. This case presents those amendments which are as constitutionally infirm as the original.

Section 207 of the ILCA, as amended, prohibits a transfer by devise or descent of undivided interests in allotments in real property if they constitute less than 2% of the total acreage or are incapable of earning $100 in any one of the five years preceding the death of the property owner unless the proposed recipient is already an owner of an undivided interest in that same property. If these conditions are not met, the property escheats to the tribe. The Interior Secretary asserts this provision is necessary to avert the ills resulting from highly fractionated interests in Indian lands. The terms of this section are justified, according to petitioner's brief, because Indians do not have a view of individual property ownership akin to that of non-Indians (Pet. Brief at Footnote 13) and, furthermore, because "the sovereign has substantial authority to regulate the laws of inheritance." Pet. Brief at 34.

The first basis for regarding this section as constitutional is both repugnant as an anachronistic, ethnocentric caricature of Indians and contrary to the provisions of the original Acts of 1887 and 1889 which were intended to divide the tribal property holdings into *individual* allotments. The second basis is equally untenable, petitioner having not demonstrated any support for the proposition that interests in property can be abrogated where no reservation is made at the time of their creation without running afoul of the Fifth Amendment.

Applying the same analysis used by this Court in *Hodel v. Irving* to what is the same regulatory scheme in all of its essential aspects, there can be no other conclusion than that Section 207 continues to violate the Fifth Amendment by

depriving property owners of an essential attribute of property ownership.

ARGUMENT

SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED, RESULTS IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

A. The Basis for Section 207, as Amended, Denies Protection of Fundamental Constitutional Rights While Perpetuating Anachronistic Notions of Native American Property Ownership

1. There is No Evidence That Congress Intended For The Original Acts to Reserve Or Otherwise Convey Any Property Interest Less Than An Absolute Undivided Interest in Fee Simple

The Acts of 1887 and 1889 were clearly *intended* to divide communal reservations of Indian tribes into *individual* allotments. *Hodel*, 481 U.S. at 706.

Nearly 150 years ago, in *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848), this Court characterized a contract regarding property in terms at odds with that proposed by the petitioner.

> Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body .... It can rest on no other foundation, can have no other guarantee. ... Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or

> founded on conditions of civil or political duty, is a contract between the State ... and the grantee; and both the parties thereto are bound in good faith to fulfil it.

Id. at 532.

The two Acts which precipitated the division of tribal lands into the hands of individual landowners were "in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society.'" *Hodel*, 481 U.S. at 706 (quoting *Solem v. Bartlett*, 465 U.S. 463, 466 (1984)). By these acts, Congress granted to Native Americans, individually, an undivided interest in the land once held by their tribes. Having thusly vested them with a legal estate, Congress cannot now undo this grant without complying with the compensation requirement of the Fifth Amendment's Takings Clause. As this Court observed more than 175 years ago:

> But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

Fletcher v. Peck, 10 U.S. 87, 135 (1810).

Nor is there any authority for the proposition that the Secretary has the authority to promulgate regulations which terminate the interests of individual property owners where no such power to revoke or impair the interests was reserved by Congress when the land was originally granted to the Indians. *See United States v. Fuller*, 409 U.S. 488, 492 (1973) (no compensation due under Fifth Amendment where permits were revocable).

Notwithstanding suggestions to the contrary, the Acts of 1887 and 1889 granted absolutely to Native Americans an unreserved personal interest in property that the Secretary cannot now deny. Petitioner provides no support, nor can there be any justification, for the proposition that Indian property owners are less deserving of protection under the Fifth Amendment to the United States Constitution.

2. There is No Justification For the Introduction of a Subjective Element Into The Takings Clause, Particularly Where Such An Element Is Defined By Race or Culture

Black's Law Dictionary defines *escheat* as "[a] reversion of property to the state in consequence of a want of any individual competent to inherit." BLACK'S LAW DICTIONARY 545 (6th ed. 1990).[3]

The United States would promote a redefinition of *escheat* to include an instance where there was no "one in existence *suitable to Congress* and able to make claim thereto." This application is apparently justified because of the anachronistic notion that individual property ownership is alien to Native Americans.

To argue that such conduct is permissible because the subjects of this regulatory scheme are Indians whose notions of private property ownership are different from ours is repugnant to say the least and, furthermore, would inject into the Takings Clause a subjective element--the property owner's personal economic theory on private property ownership--heretofore conspicuously absent.

The United States argues, however, that

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[3] It further notes that "the word, in this country, merely indicates the preferable right of the state to an estate left vacant, and without there being any one in existence able to make claim thereto." *Id.*

> it has long been recognized that "Indian lands were communal property" and that "every member of the community is an owner of it as such"--a type of organization of property that is "a thing unknown" elsewhere in this country.

Pet. Brief at 29 n.13 (citing *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302-03 (1893), *aff'd*, 155 U.S. 196, 207 (1894)). To compound this generalization, petitioner continues:

> That background supports the assumption that individuals with such small interests would not have objected to leaving them to escheat to the Tribe, for the benefit of the community as a whole.

Pet. Brief at 29 n.13.

As this Court has observed on more than one occasion,

> the basic axiom [is] that "[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984), (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

No opinion of this Court comes to mind where the subjective definition of "private property ownership" has

determined whether or not state property laws will be applied or Fifth Amendment protections afforded.[4]

The attempt by the Secretary to infuse a subjective term relating to "theories of private property" into the Fifth Amendment is all the more repugnant because it does not rely upon objective criteria but race and cultural history. Presumably, the uncompensated taking of property would be permissible so long as the state can find an instance in history where property was held communally rather than individually.[5]

This Court should eschew the specious and unsupported arguments of those who would suggest that Congress could not have intended to confer upon the Indians individual title because of the Indian's *unique notion* of property ownership.

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[4] A rule to the contrary could well "vest judges with broad subjective discretion to protect property interests that happen to appeal to them." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 261 (1978) (Brennan, J, dissenting).

[5] Amicus doubts whether *any* person could ever have a Takings claim were such a subjective element the law. The only challenge to the state would be one of how far back in history to go, whether Native American practices of the Eighteenth Century or European practices of the Middle Ages.

B. Section 207 Is Unconstitutional, Even as Amended, Applying the Same Analysis Used by This Court in Hodel v. Irving

1. Applying the Penn Central Ad Hoc Analysis, This Court in Hodel Found Section 207 to be Unconstitutional

In *Hodel v. Irving*, this Court determined Section 207 to be unconstitutional. Relying upon the *ad hoc* approach set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), this Court considered such factors

> "as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."

Hodel, 481 U.S. at 714. As the inquiry was applied to *Hodel*, this Court found there to be "no question that the *relative* economic impact of Section 207 upon the owners of these property rights could be substantial." *Id.* (emphasis added).[6]

This Court acknowledged that the "extent to which any of the appellees' decedents had 'investment-backed

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[6] This Court pointed out that the value of the property escheated to the tribe was approximately $2,700 and $1,816, neither of which were viewed as trivial sums. *Hodel*, 481 U.S. at 714. This Court evidently did not find it necessary to compare these sums to the expenses borne in managing the property. The relevant factor was intrinsic value, not income producing potential. Nevertheless, the petitioner Secretary of Interior in this case would attempt to make this very argument. *See, e.g.*, Pet. Brief at Footnote 7 and accompanying text.

expectations' in passing on the property [was] dubious." *Id.* at 715.

However, this Court demonstrated that while courts would engage in *ad hoc* evaluations based on the three factors, these factors were certainly not equal in each case. Observing that its analysis to a point had led to the belief that the section was not unconstitutional, Justice O'Connor, writing for this Court, observed under the facts of the case the third factor--character of the government action--tipped the scales in favor of finding a taking

> If we were to stop our analysis at this point, we might well find Sec. 207 constitutional. But the character of the Government regulation here is extraordinary. ... [T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property–the small undivided interest–to one's heirs. In one form or another, the right to pass on property–to one's family in particular–has been part of the Anglo-American legal system since feudal times.

Hodel, 481 U.S. at 716. The section was unconstitutional notwithstanding the fact that the interests were alleged by the government to be *de minimis*. *Id.*

2. Applying the Penn Central Ad Hoc Analysis to This Case, Section 207 as Amended Is Still Unconstitutional

The evaluation of Section 207, as amended under the three criteria set forth in *Penn Central*, leads to the inescapable conclusion that the escheat provision of Section 207 violates the Takings Clause of the Fifth Amendment to the United States Constitution. Sharing many similarities with *Hodel*, the two most significant factors affecting the plaintiffs here are that the relative economic loss

is substantial and the character of the government action is so extraordinary as to compel the finding by this Court that Section 207 was and remains unconstitutional.

a. The Relative Economic Impact on Plaintiffs Is Substantial

In this case, the petitioner attempts to employ an income-based scheme for determining whether there is a significant economic impact. Pet. Brief at 24-25. The Secretary believes that by merely substituting in the section the term of "five years" in place of "one year," all constitutional infirmities will be swept aside. Pet. Brief at 25. This simply ignores the bulk of this Court's comments related to the subject of the value of the property. Past income was but one aspect, certainly not one of paramount importance, given this Court's considerable discussion of the *total* value of the property. This Court's opinion refers to the legislative history of the 1984 amendments to Section 207 which suggest that valuable property may escheat if the section does not look back more than one year. *Hodel*, 481 U.S. at 714. However, in the context of this Court's discussion of other aspects of the property's value, the substitution of the term of years should not have been presumed to be the solution to Section 207's constitutional infirmities. Were this so, this Court's comment that "much or most of the value of the parcel may inhere in [the *right* to pass the property on to one's heirs]" (*Hodel*, 481 U.S. at 715) would have been mere surplusage.

The value of the land in this case which escheats as a result of Section 207 is said to be $2,100. Respondent's Brief in Opposition to Petition at Footnote 3 (citing Environmental Record at 4).[7] However, the Secretary avoids any substantial discussion of the actual economic loss to the

[7] This Court viewed $1,816 as valuable. *Hodel*, 481 U.S. at 714.

Native American property owners as a result of the escheatment provision of Section 207 by focussing only on one aspect of the property's value–income.

Section 207 deprives Native Americans of relatively valuable interests in property. That some of these parcels may generate little income does not make them valueless and undeserving of Fifth Amendment protections, any more than suggesting that a personal residence has no value because it does not earn rental income. Furthermore, this Court has not previously placed a dollar minimum on the amount of property that will qualify for compensation once it has determined that a protectable property interest has been taken. The Secretary can offer no justification to this Court for creating such an exception to the Takings Clause.

b. Character of the Government Action

In *Hodel*, the extent to which Section 207 abrogated the right to pass on certain types of property to one's heirs was viewed as extraordinary. *Hodel*, 481 U.S. at 716. Perhaps as extraordinary as the section itself were the arguments presented by the government in support of the section. Curiously, in addition to a few new ones, petitioner restates many of the arguments unsuccessful in *Hodel*.

For instance, petitioner cites *Andrus v. Allard*, 444 U.S. 51 (1979), in support of the proposition that Section 207 is not unconstitutional but fails to mention the fact that *Andrus* related to the sale of Indian artifacts, in violation of the Eagle Protection Act and the Migratory Bird Treaty Act. Quite simply, the extension of *Andrus*, which related to avian artifacts, does not appear justified beyond its facts.

In *Andrus*, petitioners challenged the validity of regulations promulgated by the Secretary of Interior prohibiting commercial transaction in parts of birds legally killed before birds came under protection of Eagle Protection

Act and Migratory Bird Treaty Act. This Court held that the Acts did not violate the Fifth Amendment's Takings Clause.

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking.

Andrus, 444 U.S. at 65. "In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66.

It seems difficult if not impossible to move beyond the obvious distinction that the Acts in *Andrus* created a category of personal property that could not be entered into the stream of commerce; this case involves the forfeiture of an interest in real property to the tribe. If an owner of the protected feathers did nothing, he would still retain an essential aspect of ownership, "the right to pass on [the] property to [his] family." *Hodel v. Irving*, 481 U.S. at 716. No semblance of that essential aspect of property ownership remains for plaintiffs here, whose property would escheat to the tribe upon their death unless they transferred it to an existing allotment owner.

Furthermore, as a justification for the extraordinary actions taken by the government, petitioner relies upon the notion of "average reciprocity of advantage," a theory with perhaps some merit in the context of its original application but which has been so stretched and overused, justifying every sort of taking, whether regulatory or physical, that it has become less a theory than a slogan.

(1) "Average Reciprocity of Advantage" Does Not Apply to a Transfer of Property That Should Be Exercised in Eminent Domain

Petitioner relies upon language in *Hodel* to the effect that Section 207's escheatment provision is justified by its provision of an "average reciprocity of advantage." Pet. Brief at 27 (citing *Hodel*, 481 U.S. at 715). Petitioner's reliance upon this notion of "average reciprocity of advantage" not only takes the quote out of context, stripping it of its intended meaning, but applies it to a case where the advantages are neither "average" nor "reciprocal."

In *Hodel*, this Court observed that "the owners of escheatable interests often benefit from the escheat of other's fractional interests." *Id.* at 715-16. However, the qualification overlooked or ignored by petitioner was that this aspect of Section 207 only "weigh[ed] weakly in favor of the statute." *Hodel*, 481 U.S. at 715. This advantage could only be realized "to the extent that owners of escheatable interests maintain a nexus to the Tribe." *Id.* Furthermore, this Court relied upon the assumption that "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." *Id.* at 716. However, assumptions alone cannot justify the constitutionally infirm escheatment provisions of Section 207. Petitioner relies on nothing more than the conclusory statement, "[t]he fact that the amended Act continues to offer benefits to those who also must bear its costs cuts in favor of its constitutionality." Pet. Brief at 27.

"Average reciprocity of advantage" was certainly not intended to apply to this type of case. In *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922), this Court observed that particular exercises by the states of their police power, specifically the ability to place burdens upon property, have been justified because of an "average

reciprocity of advantage." However, in *Jackman*, the object of this treatment was a "party wall," a wall, built at the edge of the property line separating two adjoining properties, that was intended to support structures on both properties. The equivalence of the benefit to both properties by the wall is obvious.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415, the Supreme Court, in an opinion written by Justice Holmes, struck down the Kohler Act which precluded coal companies from mining under inhabited land. Justice Holmes distinguished the Court's earlier decision in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), a case in which

> it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an *average reciprocity of advantage* that has been recognized as a justification of various laws.

Pennsylvania Coal, 260 U.S. at 415 (emphasis added).[8]

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[8] As the Court observed:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. ... When this seemingly absolute protection is found to be qualified by the police power, the

(continued...)

Once again, "average reciprocity" was limited to a conceptual if not literal party wall, one of coal and other subsurface strata. The Court's discussion regarding the expansion of police powers appear justified, given the attempt to justify a taking of property based on "average reciprocity." However, without legal authority for the application of a state's police powers, the notion of "average reciprocity" cannot suffice to justify an uncompensated taking of property.

Members of this Court have discussed this phrase in at least five cases in recent years, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (Rehnquist, J. dissenting); *Hodel v. Irving*, 481 U.S. 704; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and, most recently, *Dolan v. City of Tigard*, 114 S. Ct. 2309. However, in none of these cases was the reference used as a justification for an uncompensated physical taking as is advocated here by petitioner.

In *Penn Central*, a regulatory takings case, Justice Rehnquist in his dissent observed that there was *no* reciprocity of advantage.

> Where a relatively few individual buildings, all separated from one another, are

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[8] (...continued)

> natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. (citations omitted).

> singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial--in this case, several million dollars--with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions.

Id. at 140.[9]

Even in *Keystone*, reference is made to this reciprocity only in terms of nuisance, an aspect of that case having no parallel here.

> The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal*. Under our

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[9] Nor does the majority in *Penn Central rely* upon this theory of "reciprocity of advantage." This Court's broad discussion of the advantages of the Landmarks Law to all New Yorkers appears little different from an analysis of benefits and burdens in other zoning cases, such as *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Euclid v. Ambler*, 272 U.S. 365, 388-89 (1926); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928); and *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962). Each of those cases were cited as examples where zoning laws affected some property owners more severely than others. *Penn Central*, 438 U.S. at 133-34.

> system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property.

Keystone, 480 U.S. at 491 (footnotes omitted).

In *Lucas*, another regulatory takings case, this Court observed an unwillingness to

> indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned [when a property owner suffers the total deprivation of beneficial use of property.]

Lucas, 505 U.S. at 1017 (citations omitted). This Court warned of the risks that "private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

At the core of petitioner's justification for taking plaintiffs' property is the phrase "average reciprocity of advantage" and nothing more. Pet. Brief at 27. There is no analysis demonstrating either advantage or reciprocity. Furthermore, there is no declaration of the compelling reasons that must exist in this case for not regulating the property but instead seizing it from the lawful owners. There is none because none can exist for what this Court warned is nothing less than the impressment of private property "under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1017.

(2) Section 207 Abrogates the Ability of Affected Property Owners to Pass Their Property to Their Children

In *Hodel*, the abrogation of the right to pass on certain types of property to one's heirs was viewed as

extraordinary. *Hodel*, 481 U.S. at 716. This Court reached this conclusion notwithstanding the possibility that there were other devices which could be used to convey the property.

> The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property.

Id. Petitioner seeks to make that very same argument in this case, asserting that the interest in being able to transfer the property, by gift or sale, should be superior to that of being able to pass the property to the property owner's children. Pet. Brief at 27-31.

Petitioner attempts to assure this Court that, unlike the Section 207 provisions before this Court in *Hodel*, this Act "no longer entirely prohibits devise of minor fractional interests." Pet. Brief at 31. Petitioner continues:

> The amended Act provides that "[n]othing in this section shall prohibit the devise of * * * an escheatable fractional interest to any other owner of an undivided fractional interest in [the] parcel." 25 U.S.C. 2206(b). It therefore remedies the defect identified by the Court in *Hodel v. Irving* by permitting devise of property if the devisee already owns an interest in the same parcel.

Pet. Brief at 32.

In fact, petitioner's promise of a remedy rings hollow. Despite the assertion that the defects identified in *Hodel* have been cured, the contrary is assuredly true. As the District Court observed:

> The amended escheat provision corrects the defect of abolishing devises which would result in consolidation. However, for those property owners who are not legally capable of devising property, or for those like William Youpee, who do not have an heir who possesses an undivided interest in the escheatable property, the statute, as amended, continues to allow the total abolition of both descent and devise of such property.

Youpee v. Babbitt, 875 F. Supp. at 765.

Agreeing, the Court of Appeals for the Ninth Circuit stated:

> The amended statute approaches the problem from the opposite end of the Court's proposed solution. Instead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group. The amended ILCA continues to completely abrogate both the descent and devise of land to any heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest.

Youpee v. Babbitt, 67 F.3d at 199-200.

For property owners such as Mr. Youpee, the ILCA as amended promises little but takes all. Despite the Secretary's assurances, few if any lineal descendants stand to qualify under Section 207. If left in its present state, the ILCA will "designate by statute a particular heir" (Pet. Brief at 29 n.13), a practice predicated on the government's assumption of how Indians view property ownership. According to the Secretary, the fact that one is of Indian ancestry is sufficient to prove one's political and economic

views.[10] It would not be unrealistic to venture that in a few generations, all of the individually owned property will have escheated to the tribe, undoing the Acts of 1887 and 1889.

C. Nothing in This Court's Decision in Hodel v. Irving Precludes the Promulgation of Rules Designed to Minimize or Eliminate Continued Fractionation of Allotment Interests Without Violating the Fifth Amendment

In *Hodel*, this Court concluded:

> It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. ... It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property.

Hodel, 481 U.S. at 718.

Amicus submits, as was suggested by Justice Stevens in his concurring opinion in *Hodel*, that, in addition to these

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[10] Footnote 13 to petitioner's brief concludes, "individuals with such small interests would not have objected to leaving them to escheat to the Tribe, for the benefit of the community as a whole."

methods of reducing or eliminating fractionation, the United States could purchase the property, either directly from the owners or by means of a condemnation action. *Hodel*, 481 U.S. at 719, (Stevens, J. concurring).

No matter how worthy the goal of eliminating extremely fractionated interests might be, no public purpose can justify running headlong through the protections of the United States Constitution, depriving plaintiffs of their property without just compensation. Elimination by statute of important property interests is not a permissible alternative to an action in eminent domain with its attendant protection of just compensation.

CONCLUSION

The extraordinary importance of this case cannot be overstated. Asserting the constitutionality of the escheatment provision of Section 207, the Secretary of the Interior has relegated Indian property rights to a category undeserving of Fifth Amendment protections. The Secretary justifies this forfeiture of private property on the basis of three theories. Firstly, the Secretary creates a subjective element within the Takings Clause--the notion that only those property owners who historically had a coherent belief in private property ownership are entitled to its protections. Secondly, the Secretary relies upon "mutual reciprocity of advantage," an overused phrase divorced from its original meaning. Thirdly, the Secretary would ascribe a dollar value below which, no matter what the nature of the property rights implicated, the Fifth Amendment would not apply. This Court cannot permit such a result.

The Takings Clause of the Fifth Amendment has never been held to apply only to those who have a particular internalized definition of private property. Furthermore, this Court has never before permitted such a compelled transfer of property as results from the application of Section 207 as amended with no more justification than a vague assertion

that the property owner receives a portion of a collective benefit of community ownership. Nor has there been an economic threshold below which the Fifth Amendment does not apply, notwithstanding the significance of the interest implicated by the confiscatory governmental action.

This Court has the opportunity to reaffirm that the Takings Clause is not a poor cousin to all of the other protections guaranteed under the Constitution of the United States. This Court should affirm the decision of the Court of Appeals which struck down Section 207 as unconstitutional.

DATED: September, 1996.

Respectfully submitted,

Of Counsel
STEPHEN E. ABRAHAM
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

* JAMES. S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
MARVIN K. YOUPEE, SR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE ALLOTTEES ASSOCIATION AND AFFILIATED TRIBES AND BANDS OF THE QUINAULT RESERVATION, INDIAN LAND WORKING GROUP, NAVAJO LANDOWNERS RIGHTS PROJECT, INC., OGLALA SIOUX TRIBE, QUILEUTE TRIBE, SAN XAVIER DISTRICT COUNCIL, SAN XAVIER ALLOTTEES ASSOCIATION, and SAN XAVIER COOPERATIVE ASSOCIATION IN SUPPORT OF RESPONDENTS

JOEL JASFERSE
Counsel of Record
509 Zecca Drive
Gallup, NM 87301
(505) 722-4417

LEVON B. HENRY
NAVAJO LANDOWNERS RIGHTS PROJECT, INC.
P.O. Box 2104
Crownpoint, NM 87313
(505) 786-7207

KENNETH BOBROFF
DNA-PEOPLE'S LEGAL SERVICES, INC.
P.O. Box 116
Crownpoint, NM 87313
(505) 786-5277

THOMAS E. LUEBBEN
LAW OFFICE OF THOMAS E. LUEBBEN
211 12th Street NW
Albuquerque, NM 87102
(505) 842-8128
Counsel for San Xavier District Council, San Xavier Allottees Association, and San Xavier Cooperative Association

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INTEREST OF *AMICI* [1]

Amici are tribes and organizations of allotment landowners concerned with the effects of the Indian Land Consolidation Act (ILCA) on their members. *Amici's* specific concern is with the escheat provision of the ILCA and its devastating effect on individual landowners. *Amici* urge that the escheat provision be declared unconstitutional under the Fifth Amendment to the U.S. Constitution.

ALLOTTEES ASSOCIATION AND AFFILIATED TRIBES AND BANDS OF THE QUINAULT RESERVATION (AA&AT) is an organization of individual Indians owning interests in trust allotments on the Quinault Reservation, their heirs, and tribes whose members were originally allotted on the Quinault Reservation. The affiliated tribes are the Chehalis, Chinook, Cowlitz, Hoh, Ozette, Shoalwater, Queets, Quileute, and Quinault. A purpose of AA&AT is to protect treaty rights and maintain the trust relationship with the United States government. AA&AT is governed by a Board of Directors, consisting of 15 members selected at large from among trust land owners plus one representative from each tribe. The Quinault Reservation was allotted into 2,430 eighty-acre allotments. There are approximately 3,500 owners of trust land; heirs may number twice that amount.

INDIAN LAND WORKING GROUP is a national inter-tribal organization comprised of tribal representatives, allottee associations, and individual landowners who are affected by problems related to allotted and fractionated Indian trust land. The Indian Land Working Group seeks to identify and resolve these problems through activities such as annual Indian Land Consolidation Conferences, educational workshops, and legal and policy related initiatives.

NAVAJO LANDOWNERS RIGHTS PROJECT, INC. is a non-profit organization incorporated under the laws

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[1] Counsel for Petitioner and Counsel for Respondent both consent to the filing of the Brief of *Amici*. Their letters are submitted for filing herewith.

of the Navajo Nation. It works to increase the ability of individual Navajo allotment landowners and their families to use and protect their land for future generations. NLRP, Inc. is governed by a board of allotment landowners and family members. The Navajo Nation includes over 4,000 allotments with approximately 25,000 owners. NLRP, Inc. uses educational, community, public policy, and legal strategies to assist landowners in gaining control of their land.

OGLALA SIOUX TRIBE of the Pine Ridge Indian Reservation of South Dakota has 32,000 enrolled members, 18,000 of whom reside within the exterior boundaries of the reservation. The Pine Ridge Indian Reservation contains approximately 1,065,966 acres of allotted lands. The vast majority of this land has multiple owners. The Oglala Sioux Tribe is concerned that its landowners lack the necessary information and assistance from the Bureau of Indian Affairs to effectively protect their land interests from the effect of the Indian Land Consolidation Act's Section 207.

QUILEUTE TRIBE is a federally recognized tribe of about 700 members whose ancestors signed the Treaty of Olympia. Pursuant to that treaty, tribal members were allotted timber land on the Quinault Reservation. Under the Indian Land Consolidation Act valuable lands of Quileute tribal members escheat to the Quinault Indian Tribe.

SAN XAVIER DISTRICT COUNCIL, SAN XAVIER ALLOTTEES ASSOCIATION and SAN XAVIER COOPERATIVE ASSOCIATION are part of and members of the Tohono O'odham Indian Nation, a federally recognized Indian Tribe located in southern Arizona. The San Xavier District Council is the official governing body of the San Xavier District, a political subdivision of the Nation. The San Xavier Allottees' Association and the San Xavier Cooperative Assocation are non-profit corporations consisting of individual owners of allotted trust lands. There are approximately 1,300 individual owners of fractional interests in allotted trust lands within the San

Xavier Reservation. Because the majority of the lands (60%) of the San Xavier Reservation were allotted in trust to individual Indian owners more than a century ago, the San Xavier organizations and their members are severely affected by the escheat provision of the Indian Land Consolidation Act.

SUMMARY OF ARGUMENT

Fractionated allotment ownership is the legacy of choices Congress made in exercising power over Indian lands. By imposing both individual ownership and restraints on alienation, Congress created a system in which Indians who inherited undivided allotment interests have neither legal incentives nor practical means to consolidate ownership. This system has placed a severe, ever-increasing administrative burden on the Bureau of Indian Affairs and prevented the effective use of land in divided ownership. Congress' solution was Section 207 of the Indian Land Consolidation Act which, as amended, all but eliminates landowners' ability to pass to chosen heirs allotment interests smaller than 2% not immediately producing significant income. Congress created the problem of fractionated ownership and Congress' chosen solution benefits primarily the public treasury. Yet its solution, confiscating the long-recognized right to pass property to one's heirs, burdens only individual Indian landowners. The Fifth Amendment requires that such a burden be borne by the public as a whole.

This Court found in *Hodel v. Irving* that the original Section 207 was a taking of property without just compensation. The Court's opinion applied the three-part analysis from *Penn Central Transportation Co. v. New York City*. It noted that the right to pass valuable property to one's heirs is itself a valuable right and that Section 207 allowed the "escheat" of economically valuable property interests. It ruled that the Government's action in Section 207 was extraordinary, since it completely abolished devise and descent of valuable property interests, interests for which *inter vivos* transfers were inadequate as a means of passing to one's heirs.

The amendments to Section 207 were passed three years before the ruling in *Hodel v. Irving* and did little to correct the act's defects. The statute's economic impact remains substantial. By its operation, individual landowners lose the right to pass interests smaller than 2% to chosen heirs even though such interests may produce substantial income over periods longer than the five years from date of death considered under the amended statute. Timber lands, mineral interests, water rights, and land near developing areas all may produce significant income longer than five years from the date of the owners' death. As tenancies in common, small undivided interests provide use rights to the entire parcel. Co-owners can use their property to live on, farm, graze animals, hunt and fish, gather plants and herbs, collect firewood, camp, swim, play, and conduct religious ceremonies. While not earning income, such uses are valuable. Outside the context of Indian allotments, no property available for such substantial and wide ranging uses would be subject to taking without compensation.

Indian allotments also have non-economic value which merits protection under the Fifth Amendment. Despite Petitioner's unsupported speculation that Indians would prefer that their land go to the government (even a tribal government) upon their death, tribes have opposed Section 207 because it deprives their members who own allotments of family, cultural, spiritual, and historical ties to the land and their heritage. Allotment ownership, even when small, represents for many Indians long and unbroken ties to family ancestors and history, to tribal and family identity, and to spiritual and religious responsibilities. Just as compensation is due when government takes an owner's right to exclude strangers, so should it be due when the government takes an Indian landowner's similarly inchoate property interest.

The practical application of Section 207 as amended remains an extraordinary regulation of property. The statute eliminates the right to pass property for anyone incompetent to make a will. It eliminates the right to pass

property to one's chosen heirs unless those heirs happen to be co-owners. It does the same for anyone who stands to inherit an "escheatable" interest in an unfinished probate proceeding. Nothing has changed regarding *inter vivos* transfers since the Court ruled them inadequate as a substitute for devise and descent in *Hodel v. Irving*. Because all transfers, including revocable trusts, must be approved by the Secretary of the Interior (Secretary), and because transfers are subject to laborious, lengthy, and burdensome procedures of the Bureau of Indian Affairs, the right to make a will is essential to the right to pass property to one's chosen heirs. The Secretary and, by delegation, the Bureau of Indian Affairs have the incentive, means, and arguable obligation to disapprove *inter vivos* transfers by landowners seeking to avoid the confiscation caused by Section 207.

Congress chose to address fractionated ownership by taking property owners' right to pass their interests to chosen heirs. That solution is hardly the only available; other plainly constitutional options exist. The Government could compensate affected landowners. It could provide financial resources and assistance to tribes, individuals, and families to consolidate fractionated interests. It could aggressively promote estate planning among owners of divided interests. It could provide adequate information to individuals seeking to consolidate interests themselves and it could simplify the procedures necessary to effect *inter vivos* transfers approved by the Secretary. It could even place *reasonable* conditions on devise and descent of fractionated allotment interests. The Constitution allows many ways for Congress to address the problem of fractionated ownership of Indian lands. It does not allow the Government to eliminate the only practical means landowners have to pass valuable property to their chosen heirs.

ARGUMENT

I. SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT FORCES INDIVIDUAL INDIAN LANDOWNERS TO BEAR A BURDEN WHICH IN FAIRNESS AND JUSTICE SHOULD BE BORNE BY THE PUBLIC AS A WHOLE.

A. The Government created the problems of allotment land ownership, not Indian landowners.

The Federal Government caused fractionated ownership of Indian lands by imposing two policies, individual ownership and severe restrictions on alienation. In the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388, and other statutes, Congress choose to divide many tribes' lands and to convert title from communally held to individually owned.[2] *Felix S. Cohen's Handbook of Federal Indian Law* 131 (1982) (*Cohen*). The Government's stated rationale was the achievement of full Indian participation in the American system.[3] See D.S.

[2] The myth endures that all Indian tribes held property in common before European contact. *Pet. Br.* at 29, n.13. In fact, many tribes have long recognized exclusive individual and family use rights in land. Under Navajo and Pueblo law, families have rights to exclusive use of their own agricultural lands. Joe S. Sando, *Pueblo Nations* 43 (1992); Gary Witherspoon, *Navajo Kinship and Marriage* 74-82 (1975). Navajo law recognizes inheritance of use rights, *In re Estate of Benally v. Denetclaw*, 5 Navajo Rptr. 174 (1987), and requires compensation if such rights are taken by eminent domain. *Dennison v. Tucson Gas & Electric Co.*, 1 Navajo Rptr. 95 (Navajo Ct. App. 1974).

[3] Another rationale for allotment is noted in the minority report on a Dawes Act predecessor: "The main purpose of this bill is not to help the Indians, or solve the Indian problem, or provide a method for getting out of our Indian troubles so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement. . . . When the Indian has got his allotments, the rest of the land is to be put up to the highest bidder, and he is to be surrounded in his allotments with a wall of fire, a cordon of white settlements, which will gradually but surely hem in, circumscribe him, and eventually crowd him out. True, the proceeds of the sale are to be invested for the Indians; but when the Indian is smothered out, as he will be under the operations

Otis, *History of Allotment Policy, reprinted in Readjustment of Indian Affairs: Hearings on H.R. 7902 of the House Comm. On Indian Affairs, 73d Cong., 2d Sess. Pt. 9* (1934). Yet recognizing the vulnerability of new Indian landowners to loss of the land, Congress passed severe restrictions on alienation of individual Indian allotments. While in trust, Indian lands cannot be sold, devised, given, exchanged, or otherwise transferred without the approval of the Secretary of the Interior (Secretary) 25 U.S.C. 379, 404, 464, 483; 25 C.F.R. 152.17. The initial trust period of twenty-five years, subject to residential extension, was extended indefinitely by the Indian Reorganization Act, ch. 576, 48 Stat. 984, 25 U.S.C. 462 *et seq.*, and various Congressional acts and executive orders.[4] See 25 U.S.C. 462, 478-1; 25 C.F.R. Ch.I, Appendix.

As allotments passed through inheritance, they descended as undivided interests. Undivided allotment interests, however, are unlike undivided interests in fee. Owners of undivided fee interests have both incentive and means to consolidate their ownership. They are subject to forced partition by a single co-owner as well as forced sale and division of the proceeds. 4A *Powell on Real Property* ¶ 607[3], at 50-47 (June 1996). Title conveyances, meanwhile, are easily accomplished. By contrast,

of this bill, the investment will revert to the national Treasury, and the Indian, in the long run, will be none the better for it . . ." H.R. Rep. No. 1576, 46th Cong., 2d Sess., at 7-10 (1880). The Dawes Act accomplished this objective: total Indian land holdings fell from 138 million acres in 1887 to 48 million in 1934. Two-thirds of the land actually allotted, 27 million acres, passed out of Indian hands. *Cohen* at 138.

[4] Most land left Indian hands when unallotted reservation acreage was declared "surplus" and opened for white settlement. Most allotments left Indian ownership through operation of the Burke Act of 1906, ch. 2348, 34 Stat. 1015, 1018, 25 U.S.C. 349, which gave the Secretary authority to end the trust period for any allottee he found "competent." Forced fee patents resulted in many Indian allotments going out of trust, often because of fraud. See *Cohen* at 136-138; Francis Paul Prucha, *The Great Father: The United States Government nad the American Indians* 295-305 (1986).

the holder of a divided allotment interest who wants exclusive ownership (or who wants to use the property to produce income and cannot obtain co-owners' agreement) has few practical options. For allotment owners, the Government has made sales, purchases, gifts, and exchanges laborious at best, practicably impossible at worst. A century after the Dawes Act, the Government has left Indian landowners with the worst of both worlds: allotment curtailed the effectiveness of custom and land laws which once mediated family and communal ownership, see *Estate of Wauneka*, 5 Navajo Rptr. 79 (1986), and severe restraints on alienation prevent landowners from acting themselves to address fractionation.

This case is unlike those in which the owners' use of their property causes some harm which justifies government regulation. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (building a skyscraper); *Mugler v. Kansas*, 123 U.S. 623 (1887) (manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (operating a brickyard); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (operating a gravel pit). Here, the Government's regulation of the property has caused the harm being addressed. Even in recent regulatory cases where just compensation was required, the property owner's chosen use of the property had at least some relationship to the Government's rationale for regulation. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) (expansion of store and parking lot): *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (ocean-front residence); *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (construction of larger house). In the case at bar, Indian landowners are deprived of a valuable right—the right to pass property to one's heirs—simply because the Government has decided that tribal, rather than individual, ownership is preferable. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (adjustment of concentrated property ownership permitted assuming just compensation paid). Indian allotment owners had nothing to do with creating the objectionable ownership scheme, nor have they voluntarily done anything with their property to merit regulation. Yet under Section 207, individual landowners, doing nothing, will have their land forfeited to the tribe upon their death.

B. The principal and immediate benefits of Section 207 flow to the public treasury in administrative efficiency, government economy, and ease of administration by the Bureau of Indian Affairs.

Congress enacted Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, to address the difficulties of using fractionated allotted lands. *Hodel v. Irving*, 481 U.S. 704 (1987). But as with the Dawes Act, helping Indians was not Section 207's only purpose.[5] Because Indian allotments are trust property, the federal government, specifically the Bureau of Indian Affairs (BIA), is charged with maintaining ownership records, 25 C.F.R. Part 150, conducting probates, 25 U.S.C. 372, 373, making and administering leases, 25 C.F.R. Parts 162 and 212, and distributing proceeds. See, generally, *To Amend the Indian Land Consolidation Act of 1983: Hearing on H.J. Res. 158 of the Senate Select Committee on Indian Affairs*, 98th Cong., 2d Sess., 7, 11 (1984) (*1984 Senate Hearings*) (Statement of Deputy Assistant Secretary of Indian Affairs). The Government finds the administrative burden extremely heavy and increasing each time an allotment interest is further fractionated. S. Rep. No. 632, 98th Cong., 2d Sess. 4 (1984); *1984 Senate Hearings* 53-56. The General Acounting Office estimates that maintaining ownership records on 12 of the more fractionated reservations costs the BIA $40-50 million per year. Government Accounting Office, *Indian Programs: Profile of Land Ownership at 12 Reservations* 24 (Feb. 1992) (*GAO Study*). The BIA claims that it spent as much as 75% ($33 million) of its realty budget to ad-

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[5] *Amici* do not argue that relieving the Bureau of Indian Affairs' administrative burden is not a legitimate public purpose, but rather that Indian landowners are not the sole, nor even the primary, beneficiaries of Section 207.

minister fractional interests in allotments. *Pet. Br.* at 17, n.7.

In theory, Section 207's benefits to the public fisc begin immediately upon its taking effect. Every time a small interest is transferred to the tribe, the burden of the trust responsibility upon the BIA is supposed to be lightened. As soon as an interest passes to the tribe, the BIA is relieved of the trust obligation to create any further divisions or modifications of title records from the inheritance of that interest, to conduct any further probates of that interest, and to distribute any income earned from that interest to an individual owner or owners. Even theoretical benefits to Indian landowners and tribes, on the other hand, are likely to be deferred and ephemeral. Allotments which include less than 2% ownership interests are likely to have many such interests and less likely to have many large interests. In order for parcels to provide significant economic benefits to the remaining owners or the tribe, their ownership must become consolidated to a significant degree. True benefits, if any, are likely to occur only when interests are all but unified or at least sufficiently consolidated to allow the partition of large parcels into tribal ownership. Because parcels with less than 2% interests tend to have so many owners and because small interests larger than 2% will likely continue to be divided, Indian landowners and tribes can expect to wait many generations before they enjoy any significant benefits from Section 207.

C. The cost of instituting Section 207 should be borne by the public as a whole.

This Court ruled long ago that Congress had the power to govern Indian land ownership. *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911). In exercising that power, Congress has sometimes favored individual ownership, as in the General Allotment Act, and at other times favored tribal ownership, as in the Indian Reorganization Act. While Congress may be free to pursue such oscillations, it should not be free to do so without compensating

owners when it eliminates existing property rights. In trying to remedy the problems caused by the conflict between allotment and restraints on alienation, Congress has imposed upon individual landowners the full cost of its choice. While the benefits of escheat flow primarily to the BIA, to the public treasury, and to tribes, the costs are imposed solely on owners of small interests who are deprived, without compensation, of the right and value of transmitting their land to chosen family members. As the Court said in *Armstrong v. United States*, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. 40, 49 (1960). Section 207 imposes just such a burden.

II. SECTION 207 DESTROYS VALUABLE PROPERTY RIGHTS HELD BY INDIAN ALLOTMENT OWNERS.

A. An Indian landowner's right to pass an allotment interest may have significant economic value regardless of how small the interest or how little immediate income it produces.

This Court recognized in *Hodel v. Irving* that although a parcel's income may be *de minimis*, its value may not be. 481 U.S. at 714. It noted that the original Section 207 caused potentially valuable timber and mineral interests to escheat.[6] *Id.* Nothing in the amended version prevents the same impact. Although the amended statute

[6] As Justice Stevens pointed out in concurrence, Congress' use of the word "escheat" is outside the word's usual meaning. *Hodel v. Irving*, 481 U.S. at 727. An "escheat" at common law refers to what happens when a person dies intestate without lawful heirs. Here, Congress is allocating property between two contending parties, *Id.*, only one of which could qualify as an heir at law. In asserting that Section 207 simply designates a particular heir to inherit, *Pet. Br.* at 29 n.13, Petitioner ignores the fact that the tribe is no more a lawful heir at law that the government of the United States is for every citizen. A more accurate term than "escheat" would be "forfeit."

expands the number of years in which an interest can earn $100 to escape escheat, it does not, in fact, "ensure that only interests that are truly minor" will be forfeited. *Pet. Br.* at 25. The safeguard is a mirage. Many types of interests demonstrate their significant value over periods much longer than five or even ten years. Timber lands often have growth cycles of forty to eighty years, *Portland Audubon Soc. v. Lujan*, 884 F.2d 1233 (9th Cir. 1989) (Pacific Coast second-growth forest).[7] Mineral lands can vary tremendously in income depending upon market cycles, discoveries, and regulatory approvals. See *Amendments to the Indian Land Consolidation Act: Hearings on H.J. Res. 158 of the Senate Select Committee*, 98th Cong., 1st Sess. 27-29 (1983) (Statement by Marvin Sonosky representing Assiniboine and Sioux Tribes of Ft. Peck, Shoshone Business Council, and Standing Rock Sioux Tribal Council); *Draft Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project*, Docket No. 40-8968, U.S. Nuclear Regulatory Commission 1-3 (October 1994) (evaluating application submitted April 25, 1988 for uranium mine including 1440 acres of allotted land). Water rights appurtenant to allotted lands may not generate income until water adjudications are completed, see *Colville Confederated Tribes v. Walton*, 647 F.2d 42, *cert. den.* 454 U.S. 1092 (9th Cir. 1981), or water settlements achieved, see Norman H. Starler and Kenneth G. Maxey, *Equity, Liability and the Salt River Settlement*, in Thomas R. McGuire, et al., ed., *Indian Water in the New West* 126-130 (1993) ($10 million estimated value of past legal claim for water rights to 613 10-acre allotments). Land near urban or other desirable locations may become suitable for development

[7] For example, on the Quinault Reservation, allotments are commonly 80 acres. According to documents the BIA provided to *amicus* Allottees Association and Affiliated Tribes and Bands of the Quinault Reservation, 1996 timber sales of fifty-year timber averaged $6,290.94 per acre. A two per cent interest in an 80 acre allotment would yield an average of $10,065.50, yet the parcel would have no income for 49 years before and 49 years after the harvest.

(and hence earn substantial income) over a period more remote than five years. *Estate of Guadalupe Almanza Conger*, 21 IBIA 244 (1992) (interest in land near Phoenix freeway, worth as much as $100,000 per acre, escheats unless heir overcomes $100 annual income presumption in next five years).

The valuation of property using income alone is not aceptable in an eminent domain proceeding, *Nichols on Eminent Domain*, Vol. 4, § 12B.08[1] at 12B-52 (1993) ("A valuation drived from such information [as annual net profits] is often conjectural and speculative'), nor should it be acceptable in evaluating the economic impact of government action. As long as escheat is based exclusively upon income, with no provision to consider market value, Section 207 cannot ensure that only truly minor interests escheat. See *Hodel v. Irving*, 481 U.S. at 714. Consequently, it cannot ensure that the economic impact of the statute is *de minimus*.

Finally with regard to income, the Court should consider the myriad property interests which do not produce income for their owners: most homes, old family farms, small orchards, an inherited family camp or lakeside cabin. Inheritance of such properties, slight though their income may be, is "itself a valuable right." *Hodel v. Irving*, 481 U.S. at 715. The lack of income would certainly not justify the Government's uncompensated taking of such property in a non-Indian context. The same standard should apply here.

The assumption that an allotment interest of less than 2% is without significant value because of its size is similarly flawed. The General Allotment Act allotted lands in parcels of 40, 80, and 160 acres, 25 U.S.C. 331, but because Congress passed various allotment acts for individual tribes, allotments commonly range in size from as few as 10 acres, *Russ v. Wilkins*, 410 F.Supp. 579 (N.D.C.A.1976) (Covelo Indian Community, Round Valley Reservation) to more than 640 acres. *United States v. Moore*, 161 F. 513 (9th Cir. 1908) (Colville Reservation, Chief Moses band allotments). Two per cent of

a large allotment represents significant acreage—often 12.8, 6.4, or 3.2 acres—and upon partition such interests could be extremely valuable. 25 U.S.C. 483 authorizes the Secretary to consider partition of fractionated allotments upon application of a single owner if it is in the owners' best interests. *Sampson v. Andrus*, 483 F. Supp. 240 (D.S.D. 1980).[8] If the Secretary chose to exercise such discretion and provided adequate assistance and information, even small allotment interests could provide greater income and other value to their owners.

Furthermore, even undivided interests can afford valuable economic benefits to the owners in common. Many Indian landowners use allotments as homesites. In practice, living on a fractionated allotment requires negotiating with co-owners, but such is not impossible. Many Native Americans now live in urban areas, *Statistical Record of Native North Americans*, Table 227 at 420 (1993) (49% of U.S. Indian population was urban in 1980), most of these off the reservation, *GAO Study* at 8 (almost half of tribal members from 12 allotted tribes live off reservation). As a result, not all co-owners compete to use allotments as homesite. In some jurisdictions, the BIA processes one-acre homesite leases to co-owners who obtain agreement from a majority of the allotment ownership. The right to live on a piece of land and the right to obtain a homesite lease are extremely valuable economic rights in themselves.

As Petitioner notes, each owner of a tenancy in common "has the right to use and enjoy the entire property as if he were the sole owner." *Pet. Br.* at 19, citing 4A

[8] Petitioner correctly states that the Secretary's authority to partition trust land was sharply limited by the Indian Reorganization Act in 25 U.S.C. 464. *Pet. Br.* at 23, referencing *Sampson v. Andrus*, 483 F. Supp. 240. However, Petitioner neglects to note that the district court ruled that the limitation was relaxed by the passage of 25 U.S.C. 483 in 1948. 483 F. Supp. at 242-243. That statute gave the Secretary discretionary authority to partition trust land upon application of the owners, interpreted by the district court to require consideration of a single landowner's application. *Id.* at 243.

Powell on Real Property ¶ 603[1], at 50-15 (June 1996). A co-owner is limited in the right to use the property only by the same right in the other co-owners. 4A *Powell on Real Property* ¶ 603[1], at 50-15. A person who lives on land in which he or she shares divided ownership is not liable to co-owners for the value of occupying the land. *Id.* ¶ 603[1][a] at 50-15; 4 *Thompson on Real Property* § 32.07(c) at 85 (each tenant equally entitled to the intangible benefits of ownership). A co-owner, no matter how small the share, has the right to live on the property, farm or graze animals on it (if not unreasonably depleting the soil), hunt, fish, gather plants, gather herbs, gather firewood, camp, swim, play, conduct spiritual ceremonies, or collect rocks. In preventing landowners of less than 2% interests from passing on the right to use their allotment to a child or other chosen heir, Section 207 confiscates a valuable right from the owners themselves and inflicts significant economic harm.

B. An Indian landowner's right to pass an allotment interest to chosen family members is valuable for non-economic reasons.

When the Court decided that the original Section 207 violated the Takings Clause, it used the factors identified in *Penn Central* as having "particular significance" in determining when compensation is due. *Hodel v. Irving*, 481 U.S. at 714, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), in turn citing *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. While oft-repeated, those factors have not transformed themselves into a "set formula" that can be applied mechanically to determine when "justice and fairness" require compensation. Rather, the inquiry remains "essentially ad hoc, [and] factual." *Id.; Lucas v. South Carolina Coastal Council*, 112 S.Ct. At 2893. The Court has not held the *Penn Central* factors to be exhaustive. Other factors deserve consideration to the extent that they illuminate the effect and character of the government's action.

Indeed, the Court has recognized that non-economic interests in land merit protection and compensation when

they are taken. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2895, n. 8, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (interest in excluding strangers from one's land). The rights to picnic, swim, camp, and live on the land in a movable trailer have been cited as having value even if the right to build on a property was completely eliminated. *Lucas*, 112 S.Ct. at 2908 (Blackmun, J., dissenting). Various state courts have recognized the value of land available only for recreation or camping, *ibid.*, citing *Turnpike Realty Co. v. Dedham*, 284 N.E.2d 891 (Mass. 1982), cert. denied, 409 U.S. 1108 (1973); *Turner v. County of Del Norte*, 101 Cal.Rptr. 93 (1972); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987).

In judging Section 207's impact on allotment owners, both the Government in its brief and the Court in *Hodel v. Irving* have neglected to consider spiritual, family, cultural, and historical ties individual Indians have to their land. Allotment ownership, even when small, represents for many Indians long, unbroken ties to family ancestors and history, to tribal and family identity, and to spiritual and religious responsibilities. Chief Justice *emeritus* Tom Tso of the Navajo Nation Supreme Court has written about the significance of a Navajo individual's ties to a piece of allotted land:

> [Chief Justice Tso] says that the burying of one's umbilical cord on land has "profound significance," signifying a tie to Mother Earth. He states: 'Relocating traditional Navajos from the land where their umbilical cords are buried and where they have always lived is uprooting them from their religion, and from a central part of their own identities. There are no precise analogies in the non-Navajo society of which I am aware to describe the harm that such relocation causes. It would be like yanking an infant away from its mother when the infant is still screaming and the mother is reaching for it, and the mother is killed of loneliness and the child is killed for lack of tenderness and sustenance. It is tantamount to separating the

> Navajo from her spirit.' *United States v. Tsosie*, 849 F. Supp. 768, 774 (D.N.M. 1994).

Recognizing the strong non-economic value that Indian owners place on their land compels recognizing the increased value of their right to pass the land (and the enjoyment of those non-economic values) to their heirs. To many Indian owners of small allotment interests, the tie their ownership maintains to their family, culture, spirituality, and tribe is as important to them as the right to exclude strangers, no matter how small their intrusion or physical occupation, is to owners of land in fee. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). As in *Loretto*, the importance placed upon these ties is historically rooted, in this case stretching back to tribal tradition and common law, to treaties and tribe's allotment statutes which made clear the exchange of allotment for tribal title, see *Resp. Br.* at 18-22, to general federal statutes which assured the right to ownership by landowners' heirs as long as the land remained in trust. 25 U.S.C. 373.

Ignoring the many economic and non-economic benefits of undivided allotment ownership, Petitioner speculates without authority that many, even most, Indians without wills would choose to leave minor fractional interests to the Tribe and assumes that individuals with small interests would not object to their escheat to the tribe. *Pet. Br.* at 29-30, n.13. The experience of *amici* organizations and tribes in Indian Country is completely to the contrary. Even tribes receiving land from Section 207 escheats have opposed the policy: nine of the 11 tribal governments making statements at the Senate Hearings on the 1984 amendments opposed the escheat of small allotment interests without compensation for the owners. None testified in support.[9] *1984 Senate Hearings.*

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[9] Tribes stating their opposition were the Yakima Indian Nation, Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes (Ft. Peck Reservation), Northern Arapaho Tribe, Blackfeet Tribe, Nez Perce Tribe, Oglala Sioux Tribe, Wichita and Affiliated Tribes, Shoshone-Bannock Tribes (Ft. Hall). *1984 Senate Hearings.* Another tribal

Earl Old Person, Chairman of the Blackfeet Tribe, said in a statement:

> The escheat provision has created more anguish among our members than any other piece of federal legislation in recent memory. Our older members do not consider even the small interests in land to be so insignificant that they can just be taken from them. *They consider such interests as part of the invaluable heritage they are to pass on to the next generation.* They see the escheat provision as doing nothing less than cheating them out of their property. *1984 Senate Hearings* at 37, emphasis supplied.

C. Tribal ownership of allotment interests does not provide benefits and use rights equivalent to individual ownership.

Tribal ownership is no substitute for individual ownership, as any non-Indian would say at the prospect of having the government own all property. Once an interest escheats, the income from that interest, regardless of amount or duration, flows to the Tribe, not to the heirs. Rights to use tribal property are determined by the tribe pursuant to its internal political processes, including enforcement of pertinent tribal laws, ordinances, and customs in tribal courts or other forums. *Cohen* at 606; see also *United States v. Chase*, 245 U.S. 89 (1917). The heirs of an escheated allotment interest owner have no right against the tribe to possess, use, or dispose of any portion of the allotment. See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976). While some tribes might give heirs preference in obtaining use rights to the allotment, they would be under no obligation to do so. Heirs of allotment owners would have no right to exclude other tribal members from use or even damage of allotments that had been in their family for generations. No one would contend that government ownership of non-Indian lands is a suitable alternative to private ownership. Likewise, tribal ownership of allotments is no substitute for individual ownership.

official, representing the Salish and Kootenai Tribes of the Flathead Reservation opposed Section 207 at the 1992 Senate hearings ("These parcels can represent a very spiritual connection to family or to the reservation regardless of size or the value."). *Fractionated Ownership of Indian Lands: Oversight Hearing of the Senate Select Comm. On Indian Affairs*, 102nd Cong., 2d Sess. 41 (1992) *(1992 Hearings)*. Two intertribal organizations, the Indian Land Working Group and the Intertribal Agricultural Council, also opposed Section 207. *Id.* at 27, 144.

Moreover, the fact that property escheats to the tribe under Section 207 in no way compensates for the deprivation of individual ownership. Rights to tribal property are entirely derivative of tribal membership. *Halbert v. United States*, 283 U.S. 753, 762-63 (1931). One who is not a member of the tribe receiving the interest forfeited under Section 207 has no enforceable right to use or benefit from an allotment interest that escheats. Many heirs of allotment owners are not members of the same political-legal tribe as the owner and, as a result, have no rights to use or benefit from their ancestor's allotment after it is transferred. This is particularly common where members of one ethnic-cultural tribe occupy several different, independently recognized, reservations. Intermarriage is common among such political-legal tribes and, consequently, members of one often inherit allotments at another. This is the case among Sioux tribes (16 reservations), Utes (three), Paiutes (four), and Chippewa (19). *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations* (1996). For one *amicus* tribe, the Oglala Sioux Tribe, almost 20% of the owners of reservation allotments are members of other tribes. *GAO Study* at 24. In the case before the Court, the decedent owned allotment interests on three different reservations, including his own. *Pet. Br.* at 10-11. If Section 207 is upheld, his children will have no right to use or benefit from the land that he willed to them.

A similar but distinct problem occurs among tribes sharing a single reservation. For example, by various treaties, acts and executive orders, members of nine different tribes—Quinault, Quileute, Chehalis, Chinook, Cowlitz, Quit [*sic*], Ozette, Shoalwater and Hoh—were

entitled to allotments on the Quinault Reservation. *Halbert v. United States*, 283 U.S. at 755-762. An appellate court recently refused to overturn the Interior Department's decision that any reservation allotment subject to escheat under Section 207 should go to the Quinault Tribe. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) Heirs who are members of a tribe other than the one governing the allotment, have no right to share in use of the escheated land, except by gratuity of the governing tribe.

III. THE UNIQUE COMBINATION OF TRUST STATUS AND SECTION 207'S EXTREME REGULATION OF DEVISE RENDERS THE GOVERNMENT'S ACTION EXTRAORDINARY AND HENCE A TAKING.

A. Section 207's character must be evaluated in terms of its practical application.

Petitioner's brief describes allotment owners' right to pass property at death under Section 207 as though the interests were held in fee. *Pet. Br.* 28-31. Of course, this is not the case. Rather, "[a]s long as the title to the land is held in trust, there are drastic restrictions on the alienability of these allotment interests." *Tooahnippah v. Hickel*, 397 U.S. 598, 612 (1970), (Harlan, J., concurring). An Indian allotment owner's right to make *inter vivos* dispositions is limited and requires approval of the Secretary of the Interior. 397 U.S. at 609 (Opinion of the Court). It is inappropriate to evaluate Section 207 as if Indian allotment owners were as free to convey title as owners in fee.

Even the most cherished legal maxims and presumptions must be put to the test of fairness and rationality in light of common experience. As the Court noted in *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925), "[I]n passing on the constitutionality of a state law, its effects must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." Although the land affairs of allotment owners are unlike any "ordinarily conducted" outside Indian Country, applying that principle to the case at bar requires that Section 207 be evaluated in terms of its practical application upon Indian landowners. Because it operates on land titles subject to the Secretary's trust authority, Section 207's impact must be considered in conjunction with the actual exercise of that trust authority, not separate or apart from it. See *Pet. Br.* at 28, n.12. When Section 207 is evaluated in light of the Secretary's trust authority, its impact is much greater and its character much more extraordinary than is otherwise apparent.[10]

B. Section 207's regulation of devise and elimination of descent entirely abolishes the right to pass property for certain classes of allotment landowners.

By statute, the right to devise an allotment interest is limited to persons eighteen years or older. 25 U.S.C. 373. Likewise, only an allotment owner having testamentary capacity can execute a valid will. 43 C.F.R. § 4.260(a). By eliminating the right to pass an allotment through intestacy, Section 207 completely eliminates the right of minors and incompetents lacking testamentary capacity to pass their allotment interests to their heirs at their death. This is true even when descent through intestacy would result in consolidation of the allotment, as when the heir was a co-owner. Members of *amici* organizations and tribes who fall into these classes have no legal mechanism by which to avoid the application of Section 207. For them, the government's action is a "total abrogation" of the right to pass property: it abolishes both descent and devise. See *Hodel v. Irving*, 481 U.S. at 716-717.

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[10] Twelve years after the amendment of Section 207, regulations have yet to be issued. It has been the experience of *amici* organizations and tribes that the BIA has made little effort to notify owners of their potentially escheatable interests and assist them in planning their estates accordingly. Given the Government's trust responsibility towards allotment owners, *United States v. Mitchell*, 463 U.S. 206, 225 (1983), it has an obligation to make reasonable efforts to inform landowners about Section 207 and assist those wishing to avoid its effects.

Similar in effect is Section 207's impact upon heirs affected by the Department of Interior's failure to conduct probate of allotment interests in a timely manner. An heir waiting on an uncompleted probate in order to inherit an allotment interest smaller than 2% [11] is unable to make any *inter vivos* transfers for such interest until the probate is complete. With probates taking three years under the best of circumstances, *1992 Senate Hearings* at 16 (Questioning of Chief Judge, Interior Board of Indian Appeals, by Chairman of Senate Select Committee on Indian Affairs) it would not be unusual for a potential heir to pass away before a probate is complete and thereby never have the right to pass their inherited allotment interest on to their own heirs.

C. The trust status of Indian allotments precludes *inter vivos* transfers from being an adequate substitute for Section 207's extreme limitation of the right of devise.

1. *Inter vivos transfers are no more adequate now as substitutes for the right of devise than they were in* Hodel v. Irving. In *Hodel v. Irving*, Justice O'Connor ruled that although it might be possible for owners of interests to effectively control disposition upon death, such complex *inter vivos* transfers were not an adequate substitute for the rights taken by Section 207. *Hodel v. Irving*, 481 U.S. at 716. The only change since that ruling is that the amended Section 207 now allows a single devise to a co-owner. It is scarcely possible to construct a narrower choice of options. There has been no improvement in the *inter vivos* transfers and there is no reason to think they should now be considered adequate substitutes for the rights taken by Section 207.

2. *The trust status of Indian allotments requires the Secretary of Interior to review all conveyances of allotment title.* The trust status of Indian allotments subjects any conveyance of title to extraordinary regulation, to a

[11] Section 207 prohibits the devise or descent of interests smaller than 2%; it does not prevent an interest of, for example, 5%, from descending to five heirs, 1% each. 25 U.S.C. 2206.

degree unknown in the United States for any other form of property. The Indian Reorganization Act, which extended most trust periods, 25 U.S.C. 462, prohibited the "sale, devise, gift, exchange or other transfer of restricted Indian lands," except in a few limited circumstances. As noted above, this was relaxed slightly by 25 U.S. 483 and other statutes which gave the Secretary discretion to approve conveyances of land or interests in land held in restricted status by individual Indians. See 25 C.F.R. § 152.17. Without secretarial approval, however, a sale or transfer of an allotment interest is void and does not transfer title. 25 U.S.C. 348; *Mottaz v. United States*, 753 F.2d 71, 74 (8th Cir. 1985), reversed on other grounds, 476 U.S. 834 (1986).[12] Because of the trust status of Indian allotments, any efforts by landowners to avoid the effects of Section 207 must be reviewed and approved by the Secretary.

Petitioner acknowledges that all conveyances require Secretarial approval, *Pet. Br.* 28, n.12, but suggests, with no authority, that such approval would be readily granted. The statutes and regulations authorizing approval of allotment conveyances are part of a legislative history which "reflects the concern of the Government to protect Indians from improvident acts or exploitation by others, and [of] comprehensive regulations [which] govern the process of such *inter vivos* dispositions." *Tooahnippah v. Hickel*, 397 U.S. at 609. Since *Tooahnippah*, the statutory scheme has been altered by the Indian Land Consolidation Act (ILCA), which expresses Congressional disfavor of transactions which fail to consolidate fractionated interests.

3. *The Secretary has every incentive and a colorable legal obligation to disapprove inter vivos transfers necessary for allotment owners to avoid escheat.* As discussed earlier, the Secretary believes that the burden

[12] Anyone inducing an Indian to execute an instrument purporting to convey trust land or an interest in trust land or attempting to record such an instrument remains subject to criminal prosecution and penalties under 25 U.S.C. 202.

imposed by fractionated allotments upon the BIA's administrative capacity and budget is significant. To the extent that escheat of a fractionated interest lessens that burden, the Secretary has a substantial incentive not to facilitate or approve *inter vivos* transfers which prevent escheat. This incentive operates upon both the BIA personnel who prepare and process applications for Secretarial approval (and whose direct work load increases with increased fractionation) and those designated to exercise the Secretary's discretion. Action denied or delayed frustrates the purposes of allotment owners who want to avoid forfeit of their interests under Section 207. Given the Indian Land Consolidation Act itself, which expresses a Congressional policy in favor of consolidation, the Secretary is not likely to be prevented from exercising his discretion so as to prevent transfers which fail to consolidate allotment interests.

These opposing pressures on the Secretary may not rise to an actual conflict of interest. They do, however, merit consideration in determining whether Section 207 as amended remains an extraordinary government action. Concerns have been expressed about a tribe's conflict in its receipt of beneficial title to escheated property and its duty to inform property owners about the statute's workings. *Hodel v. Irving*, 481 U.S. at 727 (Stevens, J., concurring). This conflict is exacerbated if the tribe chooses to take over BIA real property functions under PL-638, the Indian Self-Determination Act. 25 U.S.C. 450, *et seq.* In that situation, the tribe is responsible for providing the data upon which escheat would be decided.[13]

The Court noted similar concerns in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980), a case in which county officials "would feel an inherent pressure and possess a natural inclination" to defer distribution of an interest-bearing interpleader account if the interest accrued to the county government. This factor

[13] The Ramah Navajo Chapter, Coeur d'Alene Tribal Council, and the Confederated Tribes of the Umatilla Indian Reservation, among others, have contracted for such authority.

weighed in the Court's decision that retention of the interest was a taking of property requiring payment of just compensation. *Id.* Conflicts among the Secretary's beneficiaries and the difficulties in serving such conflicting interests have been noted before Congress as well. See Reid Chambers, *A Study of Administrative Conflict of Interest in the Protection of Indian Natural Resources, printed by the Subcomm. On Administrative Practice and Procedure of the Senate Comm. On the Judiciary*, 91st Cong., 2d Sess. (1971).

D. The practical application of the requirement for Secretarial approval renders *inter vivos* transfers an inadequate substitute for the right to devise small allotment interests.

Unlike the owner of an interest in fee simple, the owner of a fractionated allotment interest in trust status cannot easily sell, give, or exchange his interest. As an example, the BIA Manual explains in twenty-eight single spaced pages the BIA's process for reviewing and approving sale of an allotment interest. 54 BIAM 2.2. It requires the filing of five to ten BIA forms depending on whether a sale is negotiated or bid, whether it includes water rights, and whether the purchaser is the tribe or an individual. Of these, at least four are prepared not by the landowner, but solely by the BIA. 54 BIAM 2.2.3.I (1)-(10). All must be approved by the BIA Agency Superintendent and then the Area Director as in the long range best interest of the landowner. 54 BIAM 8.2.1.B. Although the title conveyance process may work on paper, in practice members of *amici* organizations and tribes have found the process of obtaining Secretarial approval for a sale, gift deed, exchange or other transfer extraordinarily slow and laborious.[14] Procedures for partitions and leasing are

[14] According to the BIA Manual, a successful sale requires completion of the following steps: (1) An owner or owners wishing to sell property must submit to the BIA Agency Superintendent an Application for Sale of Land, Form 5-105. Unless one of the owners is found incompetent, all must agree to the sale. 25 C.F.R. 152.17; 54 BIAM 2.2.3.H(1)(a). According to the BIAM, undi-

similar, if not more complicated. According to testimony at 1992 Senate oversight hearings, making an approved gift deed for forested lands then took at least four to six years. *1992 Senate Hearing* (1992) (Testimony of Quinault Reservation allotment owner Helen Saunders).

Petitioner argues that a revocable trust is available to allotment owners wishing to transfer small interests to their heirs at death. *Pet. Br.* at 28-29. This option was expressly rejected by the Court in *Hodel v. Irving* as a suitable substitute for devise and descent, 481 U.S. at 716, and is no more satisfactory here. A person only has capacity to make a trust to the extent that they have capacity to transfer the property *inter vivos*. *Restatement (Second) of Trusts*, § 18 (1959). A revocable trust, like any other conveyance, would require secretarial approval. Petitioner's Brief does not discuss the implications of restraints on alienation upon the permissibility of a revocable trust nor does it offer any authority that such trusts have ever been tried for allotments, let alone approved by the Secretary.

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vided interests may be sold only to other owners of the land or the tribe, but the Code of Federal Regulations indicates that the Secretary can approve acquisition (and presumably sale) of fractional interests if the buyer is a co-owner, offers to buy all the remaining interests for fair market value, or has a majority of the ownership consent to the acquisition. 25 C.F.R. 151.7. (2) A Title Status Report with abstract of heirship must be obtained and it must be determined that title to the property can be conveyed. (3) The Agency Superintendent must determine and reduce to writing his judgment that the sale is in the long term best interests of the landowner. (4) An appraisal must be requested and made (Form 5-100-A), usually by the BIA. (5) Notice must be given to the tribe to allow it to negotiate purchase of whatever interest is being sold. (6) An instrument of conveyance must be prepared by the BIA and executed by the seller. (7) Instructions must be given to the Bureau of Land Management regarding any reservations and conditions which are to be included in the deed. (8) When applicable, an irrigation statement and water contract must be submitted, as must a resolution of the tribal governing body if it is the purchaser of the allotment interest. (9) All required documents must be approved by the Area Superintendent and submitted to the Area Director for final approval. 54 BIAM 2.2.3.

A similar testamentary device, a general power of appointment, was held by the Interior Department to usurp secretarial power. *Estate of Daniel J. Pierre*, 6 IBIA 17 (1977). An Interior Department Administrative Law Judge held a testamentary trust invalid for allotment interests and noted that the Department's Solicitor has routinely advised the BIA to withhold approval of trust agreements covering trust land. *Estate of Joseph Emerson*, Salt River Allottee No. 192, Probate No. IP PH 66I93, decided 2-26-93. The BIA itself did not list the option of a revocable trust in its instructions to area directors on how allotment owners can avoid escheat. *Hodel v. Irving*, 481 U.S. at 722, n.6 (Stevens, J., concurring). Nor is the possibility mentioned in regulations providing for sales, exchanges, and other conveyances of individually owned Indian land, 25 C.F.R. 152.17, 152.25. Revocable trusts are excluded from any mention in the Department of Interior's Will Drafting Manual discussion of "*Inter vivos* Responses to Fractionation." 54 BIAM Supp. 8, at 26. As far as *amici* can determine, there are no procedures, regulations, nor practices for the establishment of revocable trusts by BIA personnel nor for their approval by the Secretary. At best, a revocable trust, like any other conveyance, would be subject to secretarial approval. Given the burdens of obtaining such approval, it, like other means of transfer, remains an inadequate substitute for the right to devise.[15]

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[15] Justice Stevens, concurring in *Hodel v. Irving*, wrote that a statute calling for escheat of private property cannot impose conditions on continued ownership that are unreasonable, either because they cost too much or because the statute does not allow owners a reasonable opportunity to avoid the loss of their property. In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), the property owners had to do no more than file a claim once every twenty years. They had to rely on no government bureaucracy for discretionary approval and had to comply with no onerous procedures to avoid loss of their property. The same is not true of Section 207.

IV. THE GOVERNMENT HAS VARIOUS CONSTITUTIONAL OPTIONS AVAILABLE TO ADDRESS PROBLEMS OF FRACTIONATED ALLOTMENT OWNERSHIP.

The Court should not evaluate Section 207 as if Congress had acted to comply with the Court's ruling in *Hodel v. Irving*. Section 207 was amended in 1984, three years before *Hodel* was decided. 25 U.S.C.A. 2206. Since that ruling, Congress has taken no further action to address fractionated ownership. There are, however, options available which would not constitute a taking of property without just compensation.

As noted in *Hodel v. Irving*, the Government has several constitutional options in addressing allotment problems. Most simply, it could pay just compensation to the affected allotment owners or their estates. It could assist tribes and individuals to purchase and consolidate small fractionated interests. It could even place *reasonable* conditions upon their devise or descent. *Hodel v. Irving*, 481 U.S. at 719, J. Stevens, concurring (emphasis supplied). Other constitutional options the Government could pursue include, but are not limited to, facilitating consolidation of fractionated interests by individuals and families and promoting estate planning by allotment owners. Some components of these options would require the expenditure of government funds—not an unreasonable requirement given the origins of the fractionation problem —while others require only a change in law or administrative interpretation.

Consolidation by individual and families could be promoted without the expenditure of government funds by simplifying the rules governing sales and other conveyances. In particular, rules requiring appraisals in most sales and exchanges of fractionated interests, 25 C.F.R. 152.25, result in unnecessary expense and delay and frequently prevent consummation of land conveyances. Current regulations prohibit a non-owner, even one who owns contiguously and is a member of the owner's tribe or family, from purchasing a fractionated allotment interest without offering to purchase the entire allotment

or receiving the consent of more than half of the allotment ownership. 25 C.F.R. 151.7. This precludes individual tribal members from consolidating fractionated ownership by purchase over time. Consolidation could also be accomplished through the establishment and promotion of mechanisms for joint family ownership such as family trusts or cooperative associations.

A key element in a plan to consolidate ownership in families and individuals (as well as for effective estate planning and tribal consolidation) is providing ready access to complete and accurate land ownership information. In order to facilitate sales, gifts, exchanges, and other conveyances which consolidate title, landowners need to be able to find out who their co-owners are in a particular allotment, what other allotment interests those co-owners have, and who owns other parcels of land in the area. *1992 Senate Hearings* at 160 (Response of Indian Land Working Group to GAO Study). They also need access to information about resources and values of allotted lands. Such information is not now readily available to allotment owners, their families, or even tribal governments.[16] *Ibid.* at 25, 49.

The Government could also assist tribes and individuals in consolidating ownership by purchase. The first obstacle, of course, is funds. The Government could establish revolving loan funds which could be replenished by proceeds from allotment interests. Changes in regulations, however, would also facilitate consolidation. The prohibition against partial purchase of a fractionated allotment cited above, 25 C.F.R. 151.7, also applies to tribes and, as a result, if a tribe does not own a portion of an allotment it cannot acquire fractionated interests a little at a time. A tribe must purchase the entire allotment (and obtain consent of the ownership). The Government

[16] Although the BIA indicates that policy is otherwise, some BIA offices refuse to provide ownership information to co-owners based upon an incorrect interpretation of the Privacy Act. *1992 Hearings* at 18-19 (Response of Interior Department that Privacy Act only limits access to economic information about owners and certain probate records).

could also facilitate the establishment of Tribal Land Enterprises in which owners of fractionated allotment interests exchange those interests for ownership shares in individual land assignments from the tribal enterprise. A successful model for this approach has been demonstrated by the Rosebud Sioux Indian Tribe, *1992 Hearings* at 209 (Testimony of Ben Black Bear), but use by other tribes would require funding and technical expertise and assistance.

Finally, the Government could place *reasonable* conditions upon the devise and descent of fractionated interests. It might be reasonable to limit the number of heirs who could inherit a fractionated interest or to require such interests to descend as joint tenancies with right of survivorship. It would be reasonable to require heirs inheriting an interest to designate a single heir or beneficiary for that interest. What is not reasonable is for the Government to eliminate the only practical means landowners have to pass property to their chosen heirs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOEL JASPERSE
Counsel of Record
509 Zecca Drive
Gallup, NM 87301
(505) 722-4417

LEVON B. HENRY
NAVAJO LANDOWNERS RIGHTS PROJECT, INC.
P.O. Box 2104
Crownpoint, NM 87313
(505) 786-7207

KENNETH BOBROFF
DNA-PEOPLE'S LEGAL SERVICES, INC.
P.O. Box 116
Crownpoint, NM 87313
(505) 786-5277

THOMAS E. LUEBBEN
LAW OFFICE OF
THOMAS E. LUEBBEN
211 12th Street NW
Albuquerque, NM 87102
(505) 842-8128
Counsel for San Xavier District Council, San Xavier Allottees Association, and San Xavier Cooperative Association